Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

KATHY ST. HILAIRE, Individually, and as Executrix for the Estate of Philip St. Hilaire,

Petitioner,

vs.

CITY OF LACONIA, Laconia, New Hampshire; TOWN OF BELMONT, Belmont, New Hampshire; COUNTY OF BELKNAP, Laconia, New Hampshire; DET. DAVID A. GUNTER, of the Laconia Police Department, in his individual and official capacity; SGT. BRIAN LOANES, of the Town of Belmont, in his individual and official capacity; SGT. DAVID NIELSEN, of the Town of Belmont, in his individual and official capacity; DEPUTY SHERIFF ROBERT DUPUIS, JR., of the Belknap County Sheriff's Department, in his individual and official capacity; DEPUTY SHERIFF DANIEL COLLIS, of the Belknap County Sheriff's Department, in his individual and official capacity,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth Amendment jurisprudence of this Court requires that an unreasonable seizure claim directly resulting in the death of a human being be resolved pursuant to an objective reasonableness standard?

2. Whether it was firmly established under Fourth Amendment jurisprudence that plainclothes law enforcement agents must announce their identity and purpose before running upon a free citizen with weapons drawn?

3. Whether objectively unreasonable conduct in effecting a seizure in violation of well-established state and federal law principles can ever be subjected to a second-tier qualified immunity analysis to determine if police officers could have a good faith belief that their objectively unreasonable conduct was somehow reasonable?

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The opinion of the United States District Court for the District of New Hampshire is cited as *Kathy St. Hilaire, etc., Plaintiff v. City of Laconia, et al., Defendants,* 885 F. Supp. 349 (1995).

STATEMENT OF JURISDICTION

The petitioner seeks review from the judgment of the United States Court of Appeals for the First Circuit. The judgment was entered by the United States Court of Appeals for the First Circuit on December 1, 1995. (Appendix D). The petitioner then sought an enlargement of time in which to file a Petition for a Rehearing and Suggestion for a Rehearing En Banc. By order dated December 15, 1995, the time in which to request a rehearing was enlarged to and included December 29, 1995. (Appendix B). The petitioner timely filed a request for a rehearing. The panel of judges that rendered the decision voted to deny the Petition for Rehearing by order of the Court on January 5, 1996. (Appendix A).

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV

AMENDMENT IV - SEARCH AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

28 U.S.C. § 1343

28 U.S.C § 1343(A)(3)(4)

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of an right privilege or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable

or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT OF THE CASE

A tragic sequence of events during the effectuation of a seizure by law enforcement left Philip St. Hilaire dead from wounds inflicted by a police bullet.

A. The Shooting

In Laconia, New Hampshire on April 27, 1990, a four man team from the Belknap County Sheriff's office, the Laconia Police Department and the Belmont Police Department convened at the Belknap County Sheriff's office to prepare for the joint execution of a search warrant authorizing the search of Laconia Auto Wrecking and the "person" of Philip St. Hilaire. The team, joined by other police, then met at the premises known as Laconia Auto Wrecking in preparation for the execution of the warrant.

As Philip St. Hilaire sat in his car in the parking lot of Laconia Auto Wrecking looking forward with his radio on and his dog in the back seat, the officers approached him from behind. The police, who had been waiting behind the auto wrecking building, ran 125 feet toward St. Hilaire's car in single file with their weapons drawn, each separated by 10 to 15 feet. In a matter of seconds, Detective David Gunter of the Laconia Police Department, a stranger to Philip St. Hilaire, dressed in jeans and a t-shirt approached the passenger window pointing his .357 magnum. As St. Hilaire looked up and saw a stranger dressed in jeans and a t-shirt approaching his open passenger car window pointing a pistol at him, his eyes widened with fear. In that moment, it appeared to Detective Gunter that St. Hilaire

instinctively reached for a gun. Detective Gunter fired a bullet, hitting St. Hilaire in the neck. The bullet lodged in St. Hilaire's vertebrae, paralyzing him from the neck down. Sergeant David Nielsen of the Belmont Police Department, in full uniform, reached the driver side of the car next. As St. Hilaire lay paralyzed, he turned to the officer and said "Why didn't he identify himself? Why didn't he say he was a cop?" Later in the hospital emergency room, St. Hilaire repeatedly told his nurse "He didn't identify himself."

St. Hilaire died on October 19, 1991, as a result of complications from the injury he received from the police bullet. He was 40 years old.

B. Procedural History

Philip St. Hilaire's wife, Kathy St. Hilaire, as executrix for her husband's estate, filed suit in the United States District Court for the District of New Hampshire. She claimed that the defendants violated her husband's Fourth Amendment rights because the defendants engaged in objectively unreasonable conduct in executing a search warrant upon her husband. She claimed they failed to identify themselves as police officers and then shot her husband when he failed to yield. There is no dispute that a factual issue exists on the record as to whether law enforcement officers gave the decedent notice of their identity and purpose. The question remains whether that issue is one of "material" fact.

In the United States District Court for the District of New Hampshire, the defendants moved for summary judgment. In addressing that motion, the Court found that although "the officers contend that they shouted a series of orders to St. Hilaire with some variation of their account" (*see* Appendix E, p. 28a), the District Court assumed without deciding that the petitioner

"has produced enough factual support for her claim to raise a genuine factual dispute as to whether the defendants identified themselves as police officers when they approached St. Hilaire's vehicle." (*See* Appendix E, p. 38a).

The District Court entered summary judgment against the widow's action under 42 U.S.C. § 1983 finding that the officers were protected by qualified immunity. The District Court concluded that the officers' actions needed to be examined for "reasonableness" under the Fourth Amendment only at the moment of the shooting. In so doing, the District Court improperly applied prevailing constitutional jurisprudence.

Mrs. St. Hilaire appealed to the United States Court of Appeals for the First Circuit on the grounds that there were genuine disputes of material fact and that the officers abrogated clearly established constitutional rights. Her claim asserted that in effectuating a seizure on the run, in plain clothes with weapons drawn, the police were constitutionally required to effect the seizure in a reasonable manner. She claims the reasonableness inquiry includes adequate notice to her husband of the officers' identities and purpose.

In addressing the petitioner's claim, the First Circuit agreed ". . . that there is, on the record, a dispute of fact as to whether the police did identify themselves." (*See* Appendix D, p. 16a). The First Circuit went on to reject the District Court's analysis that the officers' actions need to be examined for reasonableness under the Fourth Amendment only at the moment of shooting. The court examined the actions of the police leading up to the seizure.

Nonetheless, the First Circuit opinion affirmed the grant of summary judgment on the ground ". . . that the factual dispute as to whether the defendant officers identified themselves as they

approached St. Hilaire is *immaterial* as a matter of law." (*See* Appendix D, p. 18a, emphasis added). Relying on this Court's decision in *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), the Court held that it was not "clearly established in this Circuit as a constitutional requirement" (*see* Appendix D, p. 23a) that law enforcement provide adequate notice to an individual of their identity and purpose in effecting a seizure.

The petitioner submits this Petition for a Writ of Certiorari seeking to overturn the First Circuit's grant of summary judgment to the defendants. She asserts that summary judgment is inappropriate in this case. Both the District Court and the First Circuit have found a genuine issue regarding police identification. In the light viewed most favorable to the petitioner, this fact is material. Pursuant to Fourth Amendment jurisprudence, a genuine issue of material fact exists concerning police identification during a lethal seizure which must be addressed by a jury.

REASONS FOR GRANTING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ERRED IN RESOLVING ISSUES OF SUMMARY JUDGMENT ON QUALIFIED IMMUNITY GROUNDS. THE DECISION FAILS TO FOLLOW EXPLICIT PRECEDENTS OF THIS COURT AS ANNOUNCED IN *GRAHAM V. CONNOR*, 490 U.S. 386 (1989) AND *TENNESSEE V. GARNER*, 470 U.S. 1 (1985). THE POLICE CONDUCT IN SURPRISING THE DECEDENT ON A DEAD RUN, IN PLAIN CLOTHES WITH WEAPONS DRAWN AND FAILING TO IDENTIFY THEMSELVES AS ANYTHING MORE THAN ORDINARY THUGS, WAS OBJECTIVELY UNREASONABLE AND THUS SUBJECT TO THE CONSTRAINTS OF THE FOURTH AMENDMENT.

The Fourth Amendment to the Constitution provides: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated. . ."

It necessarily follows that when evaluating police conduct in the execution of a deadly seizure, the Court must look to the reasonableness of that conduct. *Graham v. Connor, id.*

In this case, the petitioner asks the Court to determine whether police activity in conducting a secretive assault on the decedent in plain clothes, on a dead run and with weapons drawn, is constitutionally unreasonable.

In *St. Hilaire v. Laconia*, 71 F. 3d 20 (*see* Appendix D, p. 7a), the First Circuit's holding that the officers did not violate any constitutional requirement that was clearly established at the

time of the shooting incorrectly analyzed the petitioner's unreasonable seizure claim.

In affirming the district court's summary judgment ruling for the defendants, the First Circuit failed to conduct the requisite 'reasonable conduct analysis.' When granting the officers qualified immunity, the court mistakenly confined its analysis to whether officer identification prior to executing a search warrant was a constitutionally established principle. This law-specific reasoning does not embrace the proper analysis. Pursuant to the constitutional mandate of the Fourth Amendment, the analysis must include an inquiry as to the objective reasonableness of police conduct.

Graham establishes that an unreasonable seizure claim must be evaluated on an objectively reasonable basis. The analysis has consistently focused on the reasonableness of police activity in conducting a seizure irrespective of a specific constitutionally established principle. The principles embedded in the Fourth Amendment requires this objective evaluation.

By narrowly searching for a law-specific constitutionally established principle, the court in *St. Hilaire* undermined the significance of the Fourth Amendment's reasonableness requirement. The reasonableness of the manner in which a seizure is effected is always the inquiry. *Tennessee v. Garner, supra,* at 13; *United States v. Watson,* 423 U.S. 411 (1975); *Gerstein v. Pugh,* 420 U.S. 103 (1975); *Carroll v. United States,* 267 U.S. 132 (1925).

The requirement of reasonable activity in conducting a seizure has traditionally been a fundamental consideration in determining the scope of rights protected by the Fourth Amendment, as ". . . the underlying command of the Fourth Amendment is always that searches and seizures be reasonable," *New Jersey v. T.L.O.,* 469 U.S. 325, 337 (1985).

Moreover, it is well settled law that when evaluating an unreasonable seizure claim, the analysis focuses on all of the circumstances of the particular case, rather than on any one particular factor. The Fourth Amendment acts as a shield against objectively unreasonable police action, protecting the public from police "misuse of power." *Byars v. United States*, 273 U.S. 28 (1927). Thus, Fourth Amendment analysis requires an inquiry into all of the circumstances of police activity in conducting seizures. The analysis does not, contrary to the First Circuit's approach, call for a search for a "clearly established right" that the police identify themselves.

Today the reasonableness inquiry focuses on the totality of circumstances. *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989), held that, "Once it has been established that a seizure has occurred, the Court should examine the actions of the government officials *leading up to* that seizure." (Emphasis added). *Inyo* precludes an inquiry into the subjective intent of the officers. Rather Fourth Amendment reasonableness requires an objective analysis. Pursuant to *Graham v. Connor*, 490 U.S. 386, 397 (1989), the Fourth Amendment reasonableness standard asks, "... whether the officers actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Relying on *Graham*, the correct Fourth Amendment unreasonable seizure inquiry must include an objective analysis of the following: (1) the manner in which the officers conducted their search; (2) the method of conducting their seizure; (3) the preceding circumstances leading to use of deadly force, including lack of identification as state officials; (4) the decedent's prior cooperative encounters with law enforcement agents; (5) the potential risk of flight by decedent; (6) the severity of the crime; (7) the lack of an immediate threat to officers or others.

In *St. Hilaire,* the petitioner asserted that the method of police conduct in carrying out their lethal seizure was objectively unreasonable. Accordingly, the Court in this case should evaluate police actions both prior to and during the effectuation of a search warrant and their ensuing use of deadly force. In rejecting the district court ruling that the police officers' actions need to be examined only at the moment of the shooting, the First Circuit properly relied upon the mandate set forth in *Inyo.* However, in its next level of analysis, the court too narrowly defined the issue as one of simply searching for a law-specific constitutionally established principle. The next level should involve a consideration of the objective reasonableness of the defendants' actions as a whole.

In *Terry v. Ohio,* 392 U.S. 1, 28 (1968), the Court found that " the manner in which the [search] . . . [was] conducted is, of course, as vital a part of the inquiry as whether [it was] warranted at all." Unlike the reasoning of the First Circuit, the proper analysis includes a determination of the objective reasonableness of police activity. It is plain that the reasonableness "of a particular seizure depends not only on when it is made, but on also how it is carried out." *Graham v. Connor,* 490 U.S. 386, 389 citing *Tennessee v. Garner,* 471 U.S. 1, 7-8 (1985). Thus, prior holdings of this Court stand for the proposition that the reasonableness of the manner in which a seizure is executed is always at issue in a Fourth Amendment scenario. *Garner, Graham* and *Inyo* make plain that the reasonableness command of the Fourth Amendment controls the conduct of police in the manner in which a seizure is effected.

Justice Jackson's warning in *McDonald v. United States,* 335 U.S. 451 (1948) went unheeded in this case and a human life has been lost. There, the Court examined the Fourth Amendment requirement for a warrant and evidence seized at a bookie's apartment. In police's haste to uncover evidence of the bookie's

activities, plain clothes police officers gained entry to the premises by prying open the bedroom window of a woman in the apartment complex. In assessing the conduct of the police in that case Justice Jackson, concurring, said:

> I am the less reluctant to reach this conclusion because the method of enforcing the law exemplified by this search is one that is certain to involve the police in grave troubles if continued . . . when a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun drawn on him might shoot first. Under the circumstances of this case, I should not want the task of convincing the jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to law enforcement agencies themselves.

Id. at 461.

Here, the decedent St. Hilaire turned to his right only to be surprised by an unidentified man wearing a t-shirt and jeans, pointing a .357 magnum at him. In that moment, the police shot first. In the haste of the police to uncover suspected drugs, their conduct not only endangered the life of the suspect — it killed the suspect.

Philip St. Hilaire had a constitutionally protected right to be free from unreasonable searches and seizures. The petitioner

says that Detective Gunter, absent any notice, and in surprising St. Hilaire on a dead run, in plain clothes with his weapon drawn, blatantly disregarded the decedent's Fourth Amendment rights.

It follows that the United States Court of Appeals for the First Circuit erred in confining its analysis to the discovery of a specific constitutionally established principle solely concerning officer identification. It is well-established that law enforcement officers need to conduct themselves reasonably in making a seizure. The petitioner has put forth sufficient evidence for a jury to conclude that law enforcement engaged in objectively unreasonable conduct in seizing Philip St. Hilaire. If affirmed, the reasoning of the First Circuit necessarily eliminates any inquiry into the reasonableness of the police officers' conduct. This case is controlled by *Connor* and its explicit command:

> Today we make explicit what was implicit in *Garner's* analysis, and hold that *all* claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment and its reasonableness standard. . . .

Graham v. Connor, 490 U.S. 386, 395.

II.

THE FIRST CIRCUIT COURT OF APPEALS ERRED IN APPLYING QUALIFIED IMMUNITY TO AN EXCESSIVE FORCE CASE IN HOLDING THAT LAW ENFORCEMENT'S FAILURE TO IDENTIFY ITSELF WHILE APPROACHING THE DECEDENT IN PLAIN CLOTHES WITH WEAPONS DRAWN WAS IMMATERIAL AS A MATTER OF LAW.

A. The So-Called "Knock-and-Announce" Rule.

In its holding, the First Circuit correctly found sufficient evidence supporting the petitioner's claim that law enforcement officers did not provide adequate notice as to their identity and lawful purpose when storming the decedent in plain clothes, with weapons drawn. However, after concluding that the officers did not identify themselves or their purpose in carrying out their deadly assault on Philip St. Hilaire, the court incorrectly concluded that this factual dispute was immaterial as a matter of law.

Today, the federal government and at least forty-one states require announcement prior to arrest and search either by statute, common law, or under the reasonableness requirement of the Fourth Amendment. Many of these statutes are known as knock-and-announce laws designed to protect the sanctity of the home. The general requirement of announcement shines through each scenario.

The general requirement of announcement has always been an integral part of Anglo-American law, applying to all searches, seizures and arrests. This requirement is designed to preserve respect for the privacy of persons and promote protection. The common law policies underlying knock-and-announce rules

apply to the innocent and guilty alike. *Weeks v. United States*, 232 U.S. 383 (1914). The history of knock-and-announce jurisprudence innately includes protection against violence by startled citizens or nervous police officers waving guns during a highly charged situation that invites the use of deadly force.

In 1917 Congress adopted 18 U.S.C. § 3109, a federal knock-and-announce statute based on a New York statute from 1782. In *Miller v. United States*, 357 U.S. 301 (1958), the Court held that the statute was but a codification of the common law rule requiring officer identification.

The Model Penal Code (MPC) further demonstrates this announcement requirement. MPC § 3.07(2) *Limitations on the Use of Force* states:

> (a) The use of force is not justified under this Section unless:
>
> > (i) the actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested.

The requirement of reasonable notice of the officer's presence, identity, and purpose has traditionally been a fundamental consideration in determining the scope of rights protected by the Fourth Amendment. The courts have always recognized the principle that before a search or seizure is made "notice must be provided," *Semayne's Case*, 5 Co. Rep. 91, 77 Eng. 194 (K.B. 1603). The law has always braced the basic concept that the authorities executing a search take adequate steps to insure "that the party hath notice, that the officer cometh not as a mere trespasser, but claiming to act under proper

authority," *Lee v. Gansell*, Lofft 374, 382-383, 98 Eng. Rep. 700, 705 (K. B. 1774).

In *Sabbath v. United States*, 391 U.S. 585 (1968), the Court found that police failure first to announce their identity and purpose before entering the petitioner's apartment was unlawful. Although *Sabbath* relied on 18 U.S.C. § 3109 (the federal knock-and-announce statute) the Court reasoned that the execution of a search warrant must be governed by more than "the fortuitous circumstance of an unlocked door." *See also Ker v. California*, 374 U.S. 23 (1963), where the court found that ". . . an intrusion, it is true, can be made in a way so violative of the privacy and property rights of the occupants of a dwelling as to be *unreasonable* within the meaning of the Fourth Amendment." (Emphasis added).

As discussed *infra*, Justice Jackson, concurring in *McDonald v. United States*, 335 U.S. 451, 461 (1948), noted the great risk of unannounced police activity. His ominous warning in that case echoes the Fourth Amendment's command that law enforcement officers identify themselves and their purpose when making a seizure of a free citizen.

As stated in *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), "the knock-and-announce rule is so fundamental to our constitutional system that it must be considered a part of the reasonableness clause of the Fourth Amendment." Although the holding in *Wilson* was not effective in 1990, its summation of prior existing judicial opinions is instructive.

In *Miller v. United States*, the common law background to § 3109 was extensively examined and the Court concluded;

> The requirement of prior notice of authority and purpose before forcing entry into a home

> is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, had declared in § 3109 the reverence of the law for the individual's right of privacy in his house.

Id. at 313.

The petitioner asserts that, like the knock-and-announce rule, objectively reasonable notice of the officer's identity and purpose is a necessary part of the Fourth Amendment. She submits that law enforcement activity in this case ran afoul of the objective reasonableness required when making a seizure.

B. Excessive Force

The seminal case on Fourth Amendment excessive force scenarios is *Tennessee v. Garner,* 471 U.S. 1 (1985), establishing that "[a]pprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Id.* at 6.

Tennessee v. Garner explains the notice requirement of the Fourth Amendment in excessive force cases. In *Garner,* the Court held that:

> . . . [t]he intrusiveness of a seizure by means of deadly force is unmatched. . . . The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that the mechanism will not be set in motion. Where the officer has probable cause to believe that the suspect

> poses a threat of serious physical harm, either to the officers or others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon, deadly force may be used if necessary to prevent escape and where feasible, *some warning has been given.*

Id. 471 U.S. at 9. (Emphasis added).

It equally is well established under New Hampshire state law that in executing a warrant, the police are required to announce their lawful purpose and identity. Although holding that violation of the knock-and-announce statute was not violative of the New Hampshire constitution, the New Hampshire Supreme Court in *State v. Jones*, 127 N.H.515 (1985) held:

> . . . that New Hampshire police officers, before forcibly entering a dwelling, should knock, identify themselves and their purpose.

Id. at 518.

Furthermore, specifically in physical force scenarios, the State of New Hampshire makes clear the burden of identification placed on law enforcement agents. New Hampshire Revised Statutes Annotated, 627:5, II(b) (2), Physical Force in Law Enforcement, requires in pertinent part that before exerting permissible deadly force, the officer must have ". . . made reasonable efforts to advise the person that he is a law enforcement officer attempting to effect an arrest . . ." Here, again, the state-specific law proscribes the actions taken in this case.

Thus, the specific inquiry is not whether the "knock and announce rule" as announced by *Wilson v. Arkansas* was clearly established in 1990. Rather, the appropriate inquiry is whether the police officers' conduct in failing adequately to identify themselves could be viewed as reasonable when those police officers were aware or should have been aware of such firmly entrenched notice provisions of both New Hampshire Supreme Court, the laws of the State of New Hampshire and the laws of the land.

In this case, the officers failed to provide Philip St. Hilaire with notice of their presence, identity, or intentions; all required by Fourth Amendment jurisprudence. Relying on *Garner,* such warning was clearly feasible as the officers had complete control of the events.

Philip St. Hilaire was unaware of the police presence. He was not attempting to resist arrest. He posed no immediate threat to the officers' or others (*see* Appendix D, p. 20) and he was not in the act of committing any further criminal acts. He was simply seated in his car. Acting upon their warrant of his "person," the police were in a position easily to afford St. Hilaire adequate notice of their presence, identity, and purpose as required by firmly established principles. The available methods for providing notice were plentiful. They included: audibly announcing their presence with an amplifier; warning St. Hilaire by sounding their sirens; insuring that a uniformed officer be the first to approach his car; or choosing any other effective method of providing notice. The police methods used in seizing the decedent unreasonably violated his constitutional rights. Without providing any notice and effectively concealing their identities in street clothes, the officers in this case acted contrary to clearly established principles in an objectively unreasonable fashion.

No officer under similar circumstances could reasonably believe that plainclothes police, brandishing guns, could ambush a citizen without creating an unreasonable risk to both the officer and citizen they were seizing.

In this case, the startled decedent, fearing for his life, mistakenly viewed the police mere assailants, and sought protection. His reflexive response to guns being drawn at close range by unidentified men exemplifies the unreasonable manner in which this seizure occurred. The Fourth Amendment places the burden of reasonableness on those actions taken by the seizing authority. In *St. Hilaire,* official neglect of this requirement resulted in death.

III.

THE APPLICATION OF "QUALIFIED IMMUNITY" TO EXCESSIVE FORCE CASES WHERE THE OBJECTIVE REASONABLENESS OF THE CONDUCT OF LAW ENFORCEMENT OFFICERS IN EITHER EFFECTING AN ARREST OR EFFECTING A SEIZURE HAS RESULTED IN CONFUSING AND CONFLICTING RESULTS.

The current law regarding qualified immunity is set out in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). There this Court stated that:

> government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818.

Implicit in this ruling is the notion that when state actions violate clearly established law, a claim of immunity should fail. Qualified immunity protects government officials "as long as their actions could reasonably have been thought consistent with the rights that they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635 (1987). According to *Harlow*, ". . . the inquiry turns on the objective legal reasonableness of the action . . . and assessed in the light of the legal rules that were clearly established at the time it was taken." *Id.* at 818-819.

However, *Graham v. Connor, supra*, makes clear that the appropriate inquiry when assessing law enforcement's conduct in light of the Fourth Amendment's mandate of reasonableness is simply whether the conduct was objectively reasonable or whether it was not. A resolution of that question necessarily resolves any qualified immunity claim that law enforcement may have. This is so because it is conceptually incoherent to make a factual determination that a police officer's conduct was objectively unreasonable as a matter of law and then somehow determine that he could have believed his conduct to be reasonable.

This case readily illustrates the difficulty of applying a qualified immunity test to cases in which the unreasonable conduct of the police is assessed. The District Court granted summary judgment to the defendants on the basis of qualified immunity holding that:

> the law concerning whether a police officer who legitimately uses deadly force in self-defense nevertheless violates the Fourth Amendment by unreasonably increasing the likelihood that deadly force will become necessary was not clearly established when the defendants acted. See *Sullivan v. Horta*, 4 F.3d 2, 13 (1st Cir., 1993). Accordingly, the

> defendants are entitled to prevail on their qualified immunity defense.

(*See* Appendix E, pp. 40a-41a). That analysis by-passed an inquiry into whether the conduct of the police officers in surprising the decedent was objectively unreasonable.

Eschewing in part the District Court's analysis, the First Circuit viewed the intentional conduct of the police in approaching St. Hilaire in the manner that they did was a seizure within the meaning of the Fourth Amendment. *See Brower v. Inyo, supra.* Nevertheless, the Court invoked the doctrine of qualified immunity, holding that the manner in which the police officers conducted the seizure was immaterial as a matter of law. Relying heavily on *Wilson v. Arkansas, supra,* the First Circuit determined that it was not clearly established as a constitutional principle that police officers identify themselves in effecting a seizure. The result is that objectively unreasonable conduct is somehow protected by the doctrine of qualified immunity.

The petitioner submits that the appropriate inquiry in determining whether qualified immunity in this case is available is precisely the same inquiry in determining whether the officers' conduct is objectively reasonable under the Fourth Amendment. Logically speaking, either an officer's conduct is objectively reasonable or it is not. If it is not, it then follows that objectively unreasonable behavior violates the Fourth Amendment. This is irrespective of any subjective belief that the officer may have that his conduct is reasonable. This is precisely what *Graham v. Connor,* intends to do — that is, eliminate any inquiry into the subjective intent of police officers in effecting a seizure.

Nevertheless, the various Circuits have addressed the issue of qualified immunity in an inconsistent manner. In *Finnegan v. Fountain,* 915 F.2d 817 (2d Cir., 1990), the court held that a

qualified immunity defense is generally available in excessive force claims. However, the court acknowledged the conflict on the availability of that defense:

> We take this opportunity to consider an issue decided by the District Court and almost certain to appear again on retrial: Whether qualified immunity is generally available as a matter of law as a defense against the claim of excessive force by a law enforcement officer in effecting an arrest. While one Federal Court of Appeals has concluded that it is not, see *Holt v. Artist*, 843 F. 2d 242, 243, 246 (6th Cir., 1988) others have concluded that the defense is available. See *Brown v. Glossip*, 878 F. 2d 871, 873-74 (5th Cir., 1989); *Thorsted v. Kelly*, 858 F. 2d 571, 573 (9th Cir., 1988). The Supreme Court meanwhile has expressly reserved judgment on this issue.

Id. at 822. *Accord, see Harper v. Harris County Texas*, 21 F.3d 597 (5th Cir. 1994).

In contrast, the Seventh Circuit has determined that all excessive force claims stemming from an arrest or other seizure by police are analyzed under a Fourth Amendment "objective reasonableness standard." *Ellis v. Wynalda*, 999 F. 2d 243 (7th Cir., 1993). The court equated qualified immunity with an inquiry into the objective reasonableness of the police officer's conduct. In an unpublished opinion, *Street v. Parham*, 929 F. 2d 537 (1991), the Tenth Circuit held that it was error to instruct a jury on a qualified immunity defense after the jury had already answered a special request for instruction indicating that it found that the conduct of the police officers was unreasonable.

In *Brandenburg v. Cureton*, 882 F.2d 211 (6th Cir. 1989), the court examined a case where the plaintiff alleged that the defendant shot and killed the plaintiff/decedent without just cause. The defendant alleged that he shot and killed the decedent only after he had pointed a shotgun at him and his fellow officers. In examining the immunity question, the court held;

> In this case, however, the jury becomes the final arbiter of appellant Sharp's claim of immunity, since the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury. If the jury determines that Sharp fired on Brandenburg without belief that someone was in danger of serious bodily injury, then as a legal matter, no reasonable officer could believe that such gunfire would not violate another's constitutional rights. On the other hand, if the jury believes Detective Sharp's version of the facts, he will be entitled to qualified immunity.

Id. at 216. *See also Dixon v. Richer*, 922 F.2d 4 (10th Cir. 1991) (holding that a qualified immunity defense is no difference than a substantive objective reasonableness inquiry under the Fourth Amendment).

Based on the foregoing, it is submitted that the acceptance of this Petition for Writ of Certiorari will resolve the conflict generated by the application of qualified immunity principles in those cases in which the objective reasonableness of the police is called into question.

CONCLUSION

Wherefore, the petitioner requests that this Court grant the following relief:

A. Accept this Petition for Writ of Certiorari;

B. Reverse the judgment of the Circuit Court of Appeals for the First Circuit;

C. Remand for trial on the merits;

D. For such further relief as may be just.

Dated: April 4, 1996

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED JANUARY 5, 1996

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1463

KATHY ST. HILAIRE, ET AL.,

Plaintiff, Appellant

v.

CITY OF LOCONIA, ET AL.,

Defendants, Appellee

Before

Torruella, *Chief Judge*
Aldrich and Campbell, *Senior Judges*
Selya, Cyr, Boudin, Stahl
and Lynch, *Circuit Judges*

ORDER OF THE COURT

Entered: January 5, 1996

The panel of judges that rended the decision in this case having voted to deny the petition for rehearing and the suggestions for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

Appendix A

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By The Court

JANICE M. O'NEIL
Acting Clerk

[cc: Messrs. Bownes, O'Neil, Perrault and Beyer]

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED DECEMBER 15, 1995

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1463

KATHY ST. HILAIRE, ETC.

Plaintiff - Appellant

v.

CITY OF LACONIA, ET AL.,

Defendants - Appellees

ORDER OF COURT

Entered: December 15, 1995

Upon consideration of motion,

It is ordered that the time for filing a petition for rehearing and suggestion for a rehearing en banc be, and the same hereby is enlarged to and including December 29, 1995.

By the Court:

Francis P. Scigliano, Clerk

By JANICE M. O'NEIL
Chief Deputy Clerk

Appendix B

cc: David H. Bownes, Esq.
A. Gerard O'Neil, Esq.
Wayne C. Beyer, Esq.
Donald J. Perrault, Esq.
Christine Desmarais-Gordon, Esq.

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED DECEMBER 1, 1995

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1463

KATHY ST. HILAIRE, ETC.,

Plaintiff, Appellant,

v.

CITY OF LACONIA, ET AL.,

Defendants, Appellees.

JUDGMENT

Entered: December 1, 1995

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: Judgment of the district court is affirmed.

No costs are awarded.

Appendix C

By The Court
FRANCIS P. SCILIANO
Clerk.

[cc: Messrs. Bownes, Beyer and Perrault]

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED DECEMBER 1, 1995

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1463

KATHY ST. HILAIRE, ETC.

Plaintiff, Appellant,

v.

CITY OF LACONIA, ET AL.

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Paul J. Barbadoro, *U.S. District Judge*]

Before

Lynch, *Circuit Judge*,

Aldrich and Campbell, *Senior Circuit Judges*.

David H. Bownes, with whom *A. G. O'Neil, Jr.* and *Normandin, Cheney & O'Neil* were on brief, for appellant.

Wayne C. Beyer with whom *Wayne C. Beyer and Associates, P.C.* was on brief, for appellees City of Laconia, Town of Belmont, David A. Gunter, David Nielsen, and Brian Loanes.

Appendix D

Donald J. Perrault, with whom *Christine Desmarais-Gordon* and *Wadleigh, Starr, Peters, Dunn & Chiesa* were on brief, for appellees County of Belknap, Robert Dupuis, Jr., and Daniel Collis.

December 1, 1995

LYNCH, Circuit *Judge*. A tragic sequence of events leaving Philip St. Hilaire dead from wounds from a police bullet and leaving law enforcement officers and their municipal employers sued by his widow brings this case before us. The district court entered summary judgment against the widow's action under 42 U.S.C. § 1983, finding that the officers were protected by qualified immunity. Mrs. St. Hilaire appeals, saying there are genuine disputes of material fact and that the officers abrogated clearly established constitutional rights. We hold that while there are disputes of fact, those disputes are not material. We affirm because the defendants are entitled to qualified immunity in that they did not violate any constitutional law that was clearly established at the time of the shooting and they could reasonably have believed their search warrant was supported by probable cause.

FACTS

Armed with some evidence (the sufficiency of which plaintiff challenges), Deputy Robert Dupuis of the Belknap County Sheriff's Office applied for a search warrant from the local district court to search both the person of Philip St. Hilaire and his place of business, Laconia Auto Wrecking. Based on information from a confidential informant, the police believed St. Hilaire was selling cocaine at Laconia Auto Wrecking and that he had just travelled to New York to "score" a load of

cocaine. The warrant issued and the police planned their operation to execute the search warrant.

It was a joint operation between the Belknap Sheriff's Office, the Belknap Police and the Laconia Police. The participants — defendants Deputy Dupuis, Deputy Daniel Collis, Sgt. David Nielsen, Sgt. Brian Loanes, and Detective David Gunter — met in the early evening of April 27, 1990. The police believed St. Hilaire to be armed and possibly dangerous. They knew that St. Hilaire carried a .357 caliber revolver or a .25 caliber semi-automatic pistol, or both, and that he had a shotgun and a crossbow on the premises. They also had information that St. Hilaire had, a few days earlier, pointed a gun at the head of a person who had stooped to pick up St. Hilaire's dropped money bag. The police had also received complaints some time earlier about the sounds of shooting from the auto yard.

The police were concerned about the reflective glass on the front of Laconia Auto Wrecking, which made it difficult for people outside to see in but easy for people inside to see out. They felt it would be a danger to the police to approach the front of the building abruptly.

They decided that Deputy Dupuis and Sergeants Nielsen and Loanes would execute the search warrant. Detective Gunter, stationed across the street to help with surveillance, would then come in with his drug dog, Lux. Deputy Sheriff Collis was also stationed across the street, monitoring the auto yard, in radio communication with Dupuis. Sergeant Nielsen was in uniform; the remaining four defendant officers were in plain clothes. The search team waited at the rear of the building Patrolmen in two marked cruisers were stationed on the road on either side of the business.

Appendix D

The plan was as follows. The team, led by Sgt. Nielsen would enter the building and then search St. Hilaire and the building. If the building was closed, the officers would find a way to enter or would wait for St. Hilaire to emerge and then reach him outside. They planned to identify themselves as law enforcement officers and state their purpose. Sergeant Nielsen was to lead because he was in uniform and St. Hilaire knew him from prior encounters. The officers thought this would be the safest way to proceed. Detective Gunter testified that, in execution of a search warrant, the best policy is to make sure the subject understands that he is dealing with a police officer.

Things did not go according to plan. After watching someone else unsuccessfully trying to get in to the building, Collis concluded that the front door was likely locked and radioed so to Dupuis. Dupuis decided on more manpower and called Detective Gunter over to join the team waiting behind the building. Collis then saw St. Hilaire leave the building with his dog, lock up, and walk toward his car in the parking lot. Collis radioed this information to Dupuis.

The team, waiting behind the auto-wrecking building, decided to move in. Detective Gunter, who was closest to the parking lot, ran in front, ahead of the others. The police rounded the corner of the building and travelled the roughly 125 feet to the car in a period of seconds, hoping to reach St. Hilaire before he got into his car. It was not to be. St. Hilaire had already put his dog in the back seat, gotten into the driver's seat of his car and turned on the engine. Detective Gunter, who was dressed in jeans and a t-shirt, ran up to the car.

St. Hilaire, at that moment, looked up and saw a stranger dressed in jeans and a t-shirt, approach his open car passenger

window, pointing a .357 magnum revolver toward him. St. Hilaire's eyes widened. St. Hilaire reached for his own gun, or so it appeared to Detective Gunter. Detective Gunter fired a bullet, hitting St. Hilaire in the neck. The bullet lodged in St. Hilaire's vertebra, paralyzing him from the neck down.

Sergeant Nielsen, in uniform, reached the car next. He saw that St. Hilaire's right hand was on top of a gun on the car seat. Sergeant Nielsen told St. Hilaire to let go of the gun. St. Hilaire replied that he could not, that he could not move. The police removed the gun.

St. Hilaire said to Sgt. Nielsen, "I didn't know you guys were the cops. Why didn't he identify himself? Why didn't he say he was a cop?" Later, at the hospital emergency room, St. Hilaire repeatedly told his nurse, "He didn't identify himself." St. Hilaire made the same statements to his wife.

The police testified, at deposition, that they did identify themselves. Detective Gunter testified that when he was halfway to the car he yelled, "Phil, police, Phil" and then, at the side of the car, he yelled "Hold it." He also testified, "I'm sure I yelled 'police,' but I don't remember." Sergeant Nielsen said that he heard Detective Gunter say, "Hold it Phil, police. Hold it, police," as Detective Gunter was about a foot away from the passenger side of the car. Deputy Dupuis said he was just behind Detective Gunter and heard Detective Gunter yell "Phil, police." Deputy Dupuis said he also yelled, "Police" as he rounded the building, some 58 feet from the car. Sergeant Loanes said he heard someone say something like "Police, freeze." Two other officers, who had been stationed across the street, heard someone yell, "Police." One of them, Collis, heard "Police" within two

seconds of the gunshot. A passing motorist heard "Freeze," just before seeing the flash of a gun. Detective Gunter also said he had his police badge held in his extended left hand as he approached the car. Dupuis saw the badge in Detective Gunter's left hand immediately after the shooting.

Some currency and a bag containing three-fourths of an ounce of cocaine, worth about $2,200, were recovered from St. Hilaire's jacket. St. Hilaire died in October 1991 as a result of complications from his injuries. He was forty years old.

LEGAL CLAIMS

Kathy St. Hilaire brought suit individually and as executrix of the estate under 42 U.S.C. § 1983 asserting that defendants had violated the Fourth Amendment. She also brought pendent state law claims for negligence and negligent and intentional infliction of emotional distress. Plaintiff's Fourth Amendment theories were that the search warrant was obtained without probable cause and that the defendants "used unreasonable force in executing a search warrant upon her husband in that they failed to identify themselves as police officers and then shot her husband when he failed to yield."

The district court entered summary judgment based on qualified immunity. That decision is reviewed *de novo*. *Hegarty v. Somerset County*, 53 F.3d 1367, 1372 (1st Cir. 1995) (citing *Jirau-Bernal v. Agrait*, 37 F.3d 1, 3 (1st Cir. 1994)), *petition for cert. filed* (U.S. Oct. 17, 1995) (No. 95-629). All facts are reviewed in the light most favorable to the party opposing summary judgment. *Id.*

Appendix D

The ultimate question of qualified immunity should ordinarily be decided by the court.[1] *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). In determining whether there is a qualified immunity defense "the court should ask whether the agents acted reasonably under settled law in the circumstances." *Id.* This court has identified two prongs to the basic qualified immunity analysis. *Hegarty*, 53 F.3d at 1373 (quoting *Burns v. Loranger*, 907 F.2d 233, 235-36 (1st Cir. 1990)). First, the court must establish whether the constitutional right asserted by the plaintiff was "clearly established" at the time of the alleged violation. *Id.* Second, the court must ask whether "a reasonable

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1. While this court has not had the occasion to explore fully the allocation of functions between judge and jury where facts relevant to the immunity defense are in dispute, we have said that "we doubt the Supreme Court intended this dispute to be resolved from the bench by fiat." *Prokey v. Watkins*, 942 F.2d 67, 72 (1st Cir. 1991). The ultimate question of whether a reasonable police officer, on the basis of information known to him, could have believed his actions were in accord with constitutional rights is "a question of law, subject to resolution by the judge not the jury." *Id.* at 73. But if there is a factual dispute, "that factual dispute must be resolved by a fact finder." *Id.* The precise question of whether the judge may intercede and play that fact finder role appears not to have been clearly decided by the Supreme Court. Some courts, consonant with the Seventh Amendment, have preserved the fact finding function of the jury through special interrogatories to the jury as to the disputes of fact, reserving the ultimate law question to the judge. *See King v. Macri*, 993 F.2d 294, 299 (2d Cir. 1993); *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir.), *cert. denied*, 498 U.S. 967 (1990); *Lubcke v. Boise City/Ada Cty. Housing Auth.*, 124 Idaho 450, 860 P.2d 653, 667 (1993); *see also Oliveira v. Mayer*, 23 F.3d 642, 649 (2d Cir. 1994) (when material facts were disputed, issue of qualified immunity was for the jury), *cert. denied*, 115 S. Ct. 721 (1995); *Karnes v. Skrutski*, 62 F.3d 485, 491 (3d Cir. 1995) (same); *Presley v. City of Benbrook*, 4 F.3d 405, 410 (5th Cir. 1993) (if there remain disputed issues of material fact, jury, properly instructed, may decide issue of qualified immunity); *Brandenburg v. Cureton*, 882 F.2d 211, 216 (6th Cir. 1989) (jury is final arbiter of qualified immunity when issue depends upon which version of the facts the jury finds).

official situated in the same circumstances should have understood that the challenged conduct violated that established right." *Id.* (quoting *Burns*, 907 F.2d at 236).

Whether the rights alleged are "clearly established" is a question of law for the court. *Elder v. Holloway*, 114 S. Ct. 1019, 1023 (1994). For purposes of determining qualified immunity, the officer's actions are measured by a standard of "objective legal reasonableness . . . in light of the legal rules that were clearly established at the time [they] were taken."[2] *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (internal quotation omitted).

The Supreme Court, recognizing that the use of summary judgment in qualified immunity cases could be undermined, has held that a very broad articulation of the "clearly" established law at the time of the alleged violation is inappropriate:

> [T]he right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

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2. This court has noted that, at least in police misconduct cases, the objective reasonableness standard for liability is most likely the same as that for a qualified immunity defense. *Roy v. Inhabitants of the City of Lewiston*, 42 F.3d 691, 694 (1st Cir. 1994). But see Oliveira, 23 F.3d at 648-49 (maintaining that the two standards are distinct). In any event, we draw on the cases decided in the liability context for guidance in deciding the qualified immunity question. *See, e.g., Graham v. Connor*, 490 U.S. 386, 397 (1989).

Anderson, 483 U.S. at 640. Without such a rule, the Court said, "[a] passably clever plaintiff would always be able to identify an abstract clearly established right that the defendant could be alleged to have violated," *id.* at 640 n.2, and so defeat summary judgment.[3]

The Court has also warned against requiring too great a specificity in the "clearly established law" such that the officer would be granted qualified immunity "unless the very action in question ha[d] previously been held unlawful." *Anderson*, 483 U.S. at 640. An earlier warning against exactly such a misapplication of the qualified immunity doctrine was given in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), a warning cited in *Anderson*. In *Mitchell* the court noted:

> We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances.

472 U.S. at 535 n.12. The proper characterization of the "clearly established law" is implicated in this case.

The Shooting

Plaintiff asserts two Fourth Amendment theories as to the

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3. Similarly, we note, a "passably clever" defendant might characterize the right involved in such broad terms as to say such a broad articulation could not permit a reasonable official to understand that what he is doing violates that right and so the right was not "clearly established."

shooting, both independent of her Fourth Amendment claim as to the warrant. Plaintiff argus that "[n]o reasonable law enforcement agent could believe that in executing a search warrant the law allowed him to surprise a suspect on a dead run, in plain clothes, with gun drawn at close range, and not provide that individual with adecuate and reasonable notice of his identity and his lawful purpose." Plaintiff also argues that the facts of record "are sufficient to raise a material and genuine issue as to whether [Detective] Gunter had a reasonable belief he was acting in self defense." She claims that the "resolution of these issues is an inherently fact-based matter for the jury as no other officers observed the alleged conduct of St. Hilaire in reaching for the weapon." The latter claim is, we believe, without merit. The first claim, that the police were required to identify themselves and their lawful purpose, however, raises difficult issues.

Plaintiff argues that summary judgment was improper because there were material facts in dispute. We agree that there is, on the record, a dispute of fact as to whether the police did identify themselves. St. Hilaire's first words, as he sat with a bullet hole in his neck, were to ask why the police had not identified themselves. He repeated this question at the hospital and told his nurses and his wife that the police did not identify themselves. While an inference can be drawn from the deposition testimony of the officers that St. Hilaire simply did not hear the identifications given by the police, another plausible inference could be drawn that the police did not identify themselves. A passing motorist who heard the police say "freeze" did not hear the word "police" mentioned, although the police testimony is that the two words were uttered together. Where "inferences to be drawn from the web of facts are disputed and unclear — and are likely to depend on credibility judgments," there is a dispute of fact. *Prokey v. Watkins*, 942 F.2d 67, 73 (lst Cir. 1991).

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The existence of a factual dispute does not end the inquiry. In summary judgment terms, the disputed fact must be material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In the context of a qualified immunity defense, the legal questions for the court to decide may well determine if the dispute is material. Here, the district court acknowledged that the plaintiff's argument raised "more troubling questions." The court also assumed, without deciding, that plaintiff had raised a genuine factual dispute as to whether defendants identified themselves as they approached St. Hilaire's vehicle. *St. Hilaire v. City of Laconia*, 885 F. Supp. 349, 357 n.2 (D.N.H. 1995).

The court nonetheless entered summary judgment for defendants, on the grounds that defendants did not violate any "clearly established" law. It reasoned that St. Hilaire's Fourth Amendment rights did not attach until the seizure actually occurred and that the shooting constituted the seizure. *Id.* at 357 n.3. It reasoned that the issue before it was whether there was a clearly established obligation under the Fourth Amendment for police not unreasonably to create circumstances where the use of deadly force becomes necessary and if so, whether any such obligation was "clearly established." *Id.* at 356-57. It said there was no such clearly established obligation.

The district court analysis was reasoned and grounded on law from other Circuits. *See id.* at 357-58 (citing *Drewitt v. Pratt*, 999 F.2d 774, 780 (4th Cir. 1993) (look only to whether it was reasonable for police officer to shoot in the circumstances as they existed at that moment); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) ("we scrutinize only the seizure itself, not the events leading to the seizure"); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) ("[P]re-seizure conduct is not subject to Fourth Amendment scrutiny.")). We believe that reasoning to be in error

and to create some of the difficulties warned against in *Mitchell* and *Anderson*. We nonetheless affirm on the ground that the factual dispute as to whether the defendant officers identified themselves as they approached St. Hilaire is immaterial as a matter of law.

We first reject defendants' analysis that the police officers' actions need be examined for "reasonableness" under the Fourth Amendment only at the moment of the shooting. We believe that view is inconsistent with Supreme Court decisions and with the law of this Circuit. The Supreme Court in *Brower v. Inyo*, 489 U.S. 593 (1989), held that once it has been established that a seizure has occurred, the court should examine the actions of the government officials leading up to the seizure.[4] The Court held that petitioners decedent was "seized" when he crashed into a police roadblock set up in order to stop his flight. "We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result." *Id.* at 599. The Court remanded the cause for a determination of whether the seizure was "unreasonable" in light of petitioners' allegations that the roadblock had been set up

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4. The district court's citation of *California v. Hodari D.*, 499 U.S. 621 (1991), is inapposite. The question before the Supreme Court in *Hodari* was whether the defendant, who discarded cocaine while being pursued by police, had been "seized" at the time he dropped the drugs, for the purpose of determining whether the drugs were the fruit of an illegal seizure. *Id.* at 623. Thus, the question was not whether the seizure was *reasonable*, which requires an examination of the totality of the circumstances, but whether there had been a seizure at all. We do not read this case as forbidding courts from examining circumstances leading up to a seizure, *once it is established that there has been a seizure*. We understand *Hodari* to hold that the Fourth Amendment does not come into play *unless* there has been a seizure, not that it does not come into play *until* there has been a seizure.

in such a manner as to be likely to kill the decedent. *Id.; see also Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir.) ("[W]e carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage."), *cert. denied*, 115 S. Ct. 81 (1994).

This court has recently followed a similar approach. In *Hegarty*, this court examined each of the actions leading up to the mortal wounding of a woman whom police officers were attempting to arrest for recklessly endangering the safety of four campers. 53 F.3d 1367. Instead of focusing solely on whether the officer who shot Hegarty was acting in self-defense at the moment of the shooting (Hegarty had picked up a rifle and raised it in the direction of the officers and ignored their demands to drop it), the court examined all of the actions of the officers to determine whether there was probable cause to arrest Hegarty and whether there were exigent circumstances to allow a forcible, warrantless, nighttime entry into her dwelling. *Id.* at 1374-79. Similarly, in *Roy v. Lewiston*, this court examined all of the surrounding circumstances in determining whether the police acted reasonably: "Roy was armed; he apparently tried to kick and strike at the officers; he disobeyed repeated instructions to put down the weapons; and the officers had other reasons . . . for thinking him capable of assault." 42 F.3d at 695.

This focus on the moment of the shooting led the district court to conclude that the issue was whether there was any clearly established constitutional duty on the part of police to avoid creating situations which increased the risk of use of deadly force. The district court concluded there was no such generalized duty. *Cf. Carter v. Buscher*, 973 F.2d 1328, 1331-33 (7th Cir. 1992) (reading *Brower* to mean that courts should consider reasonableness of seizure in totality of circumstances,

but should not consider whether it was reasonable for the police to create the circumstances). But at the core of plaintiff's case is not the broad contention that the police have a duty to reduce the risk of violence. Such a contention itself creates a risk that the "duty" is so broadly defined that it gives inadequate notice of what would violate the duty and thus would fall back on whether those specific facts have occurred in the case law before. Plaintiff instead makes a narrower, more specific claim.

Plaintiff contends that in executing a search warrant, the Fourth Amendment's prohibition against "unreasonable searches" requires the police to identify themselves as police and state their purpose.[5] Plaintiff's theory is that if the police had properly identified themselves, St. Hilaire would have known they were police, would not have himself felt endangered when he saw a stranger approach with a gun in his hand, and that St. Hilaire would not have made a movement in the direction of his gun. It is that movement which led Detective Gunter to fire his own weapon. There is some additional support in the record for plaintiff's theory. St. Hilaire and the police had had prior dealings. In each, the police identified themselves and St. Hilaire did not threaten them.

It falls to the court to determine whether this right allegedly

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5. Plaintiff relies on *Tennessee v. Garner*, 471 U.S. 1 (1985), which held that the Fourth Amendment prohibits use of deadly force to prevent the escape of an apparently unarmed suspected felon unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. *Garner* indeed establishes that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Id.* at 6. But *Garner*, while helpful, did not resolve immunity issues in that case, nor does it do so here.

violated was "clearly established" at the time of the incident. "Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law." *Elder,* 114 S. Ct. at 1022.

Plaintiff relies on the Supreme Court's recent decision in *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), which held that the reasonableness of the search of a dwelling depended in part on whether law enforcement officers announced their presence and authority prior to entering, thus incorporating the common law "knock and announce" rule into the Fourth Amendment.

Assuming *arguendo* that the *Wilson* rule supports plaintiff's case,[6] plaintiff's argument succeeds only if *Wilson* merely restated what was already clearly established constitutional law at the time of the shooting in 1990. *See Davis v. Scherer*, 468 U.S. 183 (1984) (constitutional right to a pretermination or prompt post-termination hearing was not yet clearly established at time of discharge and it availed plaintiff not that defendant state officials violated state administrative regulations requiring such

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6. Fourth Amendment law in some contexts recognizes a distinction between a person's home and a person's car. For example, the Fourth Amendment permits a slightly broader search pursuant to the arrest of the occupant of a vehicle and some warrantless searches of vehicles are permitted even if there are not emergency circumstances. *See generally* 1 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 3.7 (1984). One explanation for the different protection of items found in vehicles is that "[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thoroughfares where both its occupants and its contents are in plain view." *United States v. Chadwick*, 433 U.S. 1, 12 (1977) (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974)).

hearing because § 1983 protects constitutional rights); *Elder*, 114 S. Ct. at 1023 ("[T]he clearly established right [must] be [a] federal right."); *Harlow*, 457 U.S. at 818. Thus, in order for the plaintiff to prevail, the notice requirement must have been clearly rooted in the Fourth Amendment jurisprudence in 1990. Plaintiff's argument fails because at the time of the shooting the notice requirement was not clearly of constitutional dimension.

The Court in *Wilson* noted that it had "never squarely held that this [common law] principle [of announcement] is an element of the reasonableness inquiry under the Fourth Amendment." 115 S. Ct. at 1918. The Supreme Court granted certiorari in *Wilson* precisely in order to resolve a conflict among state courts as to whether the common-law notice requirement was a part of the reasonableness inquiry under the Fourth Amendment. *Id.* at 1916. The Court noted that in California and Illinois, it had been so held, but in Massachusetts, it had been held merely a rule of common law, not constitutionally compelled. *Id.* at 1916 n.1. The highest court in New Hampshire had held only that there was a common law rule that "police officers, before forcibly entering a dwelling, should knock, identify themselves and their purpose, and demand admittance." *State v. Jones*, 127 N.H. 515, 503 A.2d 802, 805 (1985). The court in *Jones* further held that this rule "ha[d] its basis in the common law" but did not foreclose the possibility that a failure to knock and announce may be so flagrant that a subsequent entry could violate the state constitution's prohibition against unreasonable searches and seizures. *Id.* at 805-06. The issue of whether the search at issue violated the federal constitution was not before the New Hampshire court. *Id.* at 805. *Cf. Prokey*, 942 F.2d at 72 n.5 (looking to Maine law definition of probable cause as to immunity question).

Appendix D

The First Circuit has not decided whether a search in violation of the "knock and announce" rule violated the Fourth Amendment, although it has considered alleged violations of the federal "knock and announce" statute applicable to federal officers, 18 U.S.C. § 3109. *See, e.g., United States v. One Parcel of Real Property,* 873 F.2d 7, 9 (1st Cir.), *cert. denied sub nom. Latraverse v. United States,* 493 U.S. 891 (1989); *United States v. DeLutis,* 722 F.2d 902, 908-09 (1st Cir. 1983). Thus, the established law at the time of the shooting was that the notice requirement was embodied in New Hampshire's common law. It was not, though, clearly established in this Circuit as a constitutional requirement until *Wilson*. In a § 1983 action, plaintiffs must show the *constitutional* right involved was clearly established. *Davis,* 468 U.S. at 194. Accordingly, under *Harlow* the defendants are entitled to qualified immunity on this theory.

As to the plaintiff's theory that there were disputed facts as to whether Detective Gunter had a reasonable belief he was acting in self-defense when he shot St. Hilaire, we, like the district court, see no such dispute. *See* 885 F. Supp. at 356-57. The judgment Detective Gunter made in that split second was at the very least reasonable, and it is not the role of the court to second-guess the decision. *See, e.g., Hegarty,* 53 F.3d at 1377; *see also Hunter,* 502 U.S. at 229; *Anderson,* 483 U.S. at 641.

The Search Warrant.

Whether or not there was probable cause for the warrant, defendants are entitled to qualified immunity unless "the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley v. Briggs,* 475 U.S. 335, 344-345 (1986).

Appendix D

The facts presented in the warrant application are not disputed. We are thus left with the question of whether defendants are entitled to qualified immunity as a matter of law. Fed. R. Civ. P. 56(c). Recognizing that the police may not obtain immunity by relying on the judgment of the judicial officer issuing the warrant under *Malley*, the deferdants argue that there were reasonable indicia of probable cause and their belief they had probable cause can not be called unreasonable. That is, indeed, what the undisputed record demonstrates. A confidential informant told Deputy Dupuis that St. Hilaire was selling cocaine from Laconia Auto Wrecking, which was owned and operated by St. Hilaire. Dupuis consulted with detectives at the Laconia and Belmont Police Departments who had worked with the confidential informant on prior occasions. These detectives told Dupuis that the informant had twice previously provided information that led to seizures of contraband and the arrests and convictions of several persons. The informant then met with Dupuis and Detective Gunter in order to make a controlled purchase at Laconia Auto Wrecking. The substance purchased tested positive for cocaine. A second controlled purchase was made; the substance obtained also tested positive for cocaine. The informant also told Dupuis that St. Hilaire was going to New York to "score" a load of cocaine. Airline records confirmed that St. Hilaire had made a reservation to fly to New York around the same time as the informant's report.

On these facts, we cannot say that the indicia of probable cause are so lacking as to render official belief in its existence unreasonable. *See Malley*, 475 U.S. at 344-45. Defendants are therefore entitled to qualified immunity with respect to plaintiffs claim for lack of probable cause to issue the warrant.

Appendix D

Municipal Defendants

The claims against the municipal defendants necessarily fail because we find there was no deprivation of St. Hilaire's clearly established rights and there was reasonable ground to believe the warrant supported by probable cause.

The judgment of the district court is affirmed. No costs are awarded.

APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE FILED MARCH 31, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 93-191-B

Kathy St. Hilaire

v.

City of Laconia, et al.

MEMORANDUM AND ORDER

Laconia Police Department Detective David Gunter shot and killed Philip St. Hilaire while executing a search warrant. St. Hilaire's wife, Kathy, has sued Gunter, the other officers involved in executing the warrant, and their employers. She argues that the defendants violated her husband's Fourth Amendment rights because: the warrant authorizing the search was not supported by probable cause; defendants omitted material facts from the affidavit supporting the warrant application; and defendants unreasonably used deadly force in executing the warrant. She also alleges that defendants are liable under various state law theories. Defendants have responded with summary judgment motions contending that the individual defendants are protected from suit on her federal claims by the doctrine of qualified immunity. They also argue that plaintiff has failed to state a constitutional claim against the municipal defendants. Finally, defendants ask me to decline supplemental jurisdiction over plaintiff's state law claims.

Appendix E

I. *FACTS*

On April 27, 1990, Belknap County Deputy Sheriff Robert Dupuis applied for a warrant to search Philip St. Hilaire and his business, Laconia Auto Wrecking, for cocaine, drug paraphernalia, and materials related to drug trafficking. Dupuis provided an affidavit in support of the warrant application that included information from a confidential informant who allegedly told Dupuis that St. Hilaire was selling cocaine at Laconia Auto Wrecking. Dupuis further alleged in his affidavit that: the informant had purchased cocaine from Laconia Auto Wrecking on two occasions under police supervision within the last two weeks; Dupuis was able to partially corroborate the informant's claim that St. Hilaire was planning a trip to New York to purchase cocaine; and two of Dupuis' fellow officers had previously obtained reliable information from the informant. Based on this information, a special justice of the Laconia District Court issued the warrant the same day.

After Dupuis obtained the warrant, he and other law enforcement personnel, including defendants Gunter, David Nielsen and Brian Loanes of the Belmont Police Department, and Daniel Collis of the Belknap County Sheriff's Office, met at the sheriff's office to plan the searches. The group decided that Nielsen, Loanes, and Dupuis would form a team to find and search St. Hilaire. Nielsen volunteered to wear his uniform and the others agreed that they would remain in plain clothes. Collis and Gunter were assigned to surveillance across the street from Laconia Auto Wrecking. All of the defendants were warned that St. Hilaire was likely to be armed.

The defendants planned to search St. Hilaire while he was at work. Accordingly, the search team agreed to meet in the parking

lot of the nearby vocational-technical school and to walk through the woods to the rear of Laconia Auto Wrecking. They would then wait at the back corner of the building with Collis and Gunter watching the front to let them know if the building appeared to be open for business. They also planned to station patrolmen in marked cruisers on the road on either side of Laconia Auto Wrecking. If surveillance reported that the building appeared to be open, the search team would come to the front of the building, enter with Nielsen in uniform leading, and confront St. Hilaire inside the building. If the building was closed for business, they would either try to break in or wait for St. Hilaire to leave the building and apprehend him in the yard.

At first, all went according to plan. The cruisers and surveillance were in place. The search team assembled in the parking lot and then walked to the rear of the building. When they learned from surveillance that the building appeared to be locked, Dupuis called Gunter at his position in the parking lot across the street and instructed him to join the search team. While they were waiting for tools and making plans to break in, Collis radioed that St. Hilaire was leaving the building. The group then immediately ran to the front of the building and saw that St. Hilaire was sitting in the driver's seat of his car with his back to the approaching officers.

Instead of approaching St. Hilaire in a group with Nielsen in uniform leading as planned, the officers ran toward the car from behind, with their weapons drawn, in single file separated by ten to fifteen feet. Gunter, in plain clothes, was in the lead, followed by Dupuis, Nielsen, and Loanes. The officers contend that they shouted a series of orders to St. Hilaire with some variation in their accounts. Gunter states that he said "Phil, Phil, police" as he approached the rear of the car, and that he thought he may have

yelled, "Hold it" or "Police," when he arrived at the passenger door. Nielson reports that he heard Gunter yell, "Hold it Phil, police, hold it," as Gunter approached the passenger side of the car and that no one else said anything. Dupuis claims that he yelled, "Police," once or twice as he came around the corner of the building but stopped because other people were yelling. Loanes states that he did not shout anything, but he heard others say, "Police freeze," or "Phil, its the police," or "Freeze, its the police." Collis states that he heard yelling from one officer, he did not know who, including the word "Police." Finally, a motorist passing the building at the time reported that he heard a shout of "Freeze" just before seeing the flash of a gunshot.

Gunter ran to the passenger side of the car with his gun in his right hand. When Gunter reached the car, St. Hilaire turned and made eye contact with him. At the same time, Gunter saw St. Hilaire's right shoulder move and later claimed that he thought that St. Hilaire was reaching for his gun. Gunter then shot St. Hilaire through the partially open passenger window.

Nielsen opened the driver-side door and found St. Hilaire slumped in the seat with a critical throat wound. St. Hilaire's gun was found next to him on the seat of his car. Nielsen reports that St. Hilaire asked him, "Why didn't he identify himself, why didn't he say he was a cop," and others state that St. Hilaire repeated the same questions at the hospital. As a result of the gunshot wound, St. Hilaire was paralyzed from his neck down. He died from complications caused by his injuries approximately eighteen months after the shooting.

II. *STANDARD OF REVIEW*

Summary judgment is appropriate if, after reviewing the

facts in the light most favorable to the nonmoving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Woods v. Friction Materials. Inc.*, 30 F.3d 255, 259 (1st Cir. 1994). A "genuine" issue is one "that properly can be resolved only by a finder of fact because [it] may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 250 (1986); *accord Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990). A "material issue" is one that "might affect the outcome of the suit" under the applicable legal standard. *Anderson*, 477 U.S. at 248. The burden is upon the moving party to show the lack of a genuine, material factual issue. *Finn v. Consolidated Rail Corp.*, 782 F.2d 13, 15 (1st Cir. 1986). When a motion for summary judgment is properly supported, the burden shifts to the nonmovant to show that a genuine issue exists. *Donovan v. Agnew*, 712 F.2d 1509, 1516 (1st Cir. 1983). If the nonmovant fails to offer sufficient factual support to counter the movant's proffer on an element for which the nonmovant bears the burden of proof at trial, all other factual issues become immaterial, and the movant is entitled to summary judgment. *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 12 (1st Cir. 1994), *petition for cert. filed*, (Feb. 21, 1995).

III. *DISCUSSION*

The primary issue presented by defendants' summary judgment motions is whether the individual defendants are entitled to qualified immunity with respect to plaintiff's constitutional claims. Thus, I begin by describing the law governing qualified immunity claims and then consider its application to plaintiff's specific claims that the individual

defendants violated St. Hilaire's Fourth Amendment rights. I then turn to defendants' challenges to plaintiff's remaining claims.

A. *Qualified Immunity for Constitutional Claims Against the Individual Defendants*

In *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982), the Supreme Court recognized that public officials performing discretionary functions are entitled to qualified immunity from suit for violations of federal law "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." A "necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley,* 500 U.S. 226, 232 (1991). Thus, a court may determine that a defendant is entitled to qualified immunity if either the plaintiff fails to properly assert and support a claim based on the violation of a constitutional right, or the court concludes that the law on which plaintiff's claim was based was not clearly established when the defendants acted. *Id., see also Febus-Rodriguez v. Betancourt-Lebron,* 14 F.3d 87, 91 (1st Cir. 1994) (holding that as a predicate to the qualified immunity inquiry, "a plaintiff must establish that a particular defendant violated the plaintiff's federally protected rights.").

The resolution of a qualified immunity defense presents a legal question for the court. *Elder v. Holloway,* 114 S.Ct. 1019, 1023 (1994); *Whiting v. Kirk,* 960 F.2d 248, 250 (1st Cir. 1992). Moreover, since the immunity is an immunity from suit rather than merely a defense to liability, it is imperative that such claims

be resolved at the earliest possible date after suit is commenced. *Siegert*, 500 U.S. at 232-33. Thus, I will determine defendants' entitlement to immunity on their motions for summary judgment unless factual disputes material to the issue require resolution by the jury before I can resolve the legal questions their motions present. *See Prokey v. Watkins*, 942 F.2d 67, 73 (1st Cir. 1991).

1. Probable Cause

Plaintiff first claims that she is entitled to damages because the defendants lacked probable cause to seize St. Hilaire. Probable cause to issue a warrant exists if the totality of the circumstances related in the affidavit, viewed with common-sense, presents a fair probability that the proposed search will find contraband or evidence of a crime. *United States v. Jordan*, 999 F.2d 11, 13 (1st Cir. 1993) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Under the totality of the circumstances test, the value of a confidential informant's information is evaluated in light of all the indicia of its reliability, and a deficiency in one area may be compensated by the strength of other relevant factors. *United States v. Diallo*, 29 F.3d 23, 25 (1st Cir. 1994) (citing *Gates*, 462 U.S. at 232-33).

The affidavit that Dupuis submitted in support of the search warrant application alleges that: (1) St. Hilaire owned Laconia Auto Wrecking; (2) an informant, whose established record of providing reliable information was detailed in the affidavit, reported that St. Hilaire was selling cocaine at his place of business; (3) the informant, acting under police supervision, subsequently purchased cocaine at St. Hilaire's business on two occasions in the weeks prior to the seizure; (4) the informant told the defendants that St. Hilaire was planning a trip to New York to purchase cocaine; and (5) airline records confirmed that St.

Hilaire had made a reservation around the same time as the informant's report on a flight to New York's LaGuardia Airport.

These allegations sufficiently demonstrate the informant's reliability and corroborate his claim that St. Hilaire was engaged in the business of selling cocaine to support the issuing judge's probable cause finding even though the affidavit does not expressly allege that the informant purchased cocaine directly from St. Hilaire. *See Gates*, 462 U.S. at 230; *see also Jordan*, 999 F.2d at 13-14. Accordingly, because plaintiffs have not shown that the search warrant lacked probable cause, defendants are entitled to immunity with respect to plaintiff's probable cause claim.

2. Material Omissions

Plaintiff next argues that St. Hilaire's seizure was unlawful because Dupuis failed to disclose in his affidavit that his informant was induced to provide information against St. Hilaire through offers of unspecified "consideration" with respect to several outstanding felony charges. The Supreme Court has recognized that a police officer's reckless or intentional misstatements of material fact in a search warrant affidavit violate the Fourth Amendment. *Franks v. Delaware*, 438 U.S. 154 (1978). This rule has been extended by various courts of appeal to include an affiant's intentional or reckless omission of material facts. *See United States v. Higgins*, 995 F.2d 1, 4 (1st Cir. 1993); *United States v. Knapp*, 1 F.3d 1026, 1029 (10th Cir. 1993); *United States v. Travis*, 993 F.2d 1316, 1320 (8th Cir.), *cert. denied*, 114 S. Ct. 229, 245 (1993). When plaintiff claims a Fourth Amendment violation based on alleged omissions of material facts from a warrant application, the merit of the claim depends on "'whether, even had the omitted statements been

included in the affidavit, there was still probable cause to issue the warrant.'" *Higgins*, 995 F.2d at 4 (quoting *United States v. Rumney*, 867 F.2d 714, 720-21 (1st Cir.), *cert. denied*, 491 U.S. 908 (1989)).

Even if Dupuis's affidavit had been corrected to include the "consideration" the police offered the informant, it still would have demonstrated probable cause to justify the search because the affidavit contained enough corroboration and sufficient evidence of the informant's past reliability to establish the probable accuracy of the informant's information. Thus, plaintiff has failed to properly support her material omissions claim, and therefore, defendants are entitled to immunity with respect to this claim.

3. Excessive Force

Plaintiff's final claim is that defendants used unconstitutionally excessive force in executing the warrant.

a. Fourth Amendment Reasonableness and Qualified Immunity

Excessive force claims arising during the course of a police search or seizure must be analyzed under the Fourth Amendment's reasonableness clause. *Graham v. Connor*, 490 U.S. 386, 395 (1989).[1] Precedent dictates that the reasonableness of searches and seizures must be evaluated by considering whether the officer's conduct was objectively reasonable when

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1. Plaintiff alleged in her complaint that defendants' use of deadly force also violated St. Hilaire's right to substantive due process. However, in light of *Graham*, plaintiff has abandoned this cause of action.

judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396. Moreover, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." *Id.* at 397. Ultimately, the reasonableness of an officer's use of force will be determined by "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (quotations omitted).

Because a determination of both liability for and immunity from claims based on violations of the Fourth Amendment's reasonableness clause require an inquiry into the objective reasonableness of a defendant's conduct, some courts in other circuits appear to suggest that the same test should be used to evaluate both the substantive claim and the immunity defense. *See Wardlaw v. Pickett*, 1 F.3d 1297, 1303 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 2672 (1994); *Hopkins v. Andaya*, 958 F.2d 881, 885 n.3 (9th Cir. 1992); *Jackson v. Hoylman*, 933 F.2d 401, 402-03 (6th Cir. 1991); *Street v. Parham*, 929 F.2d 537, 540-41 n.2 (10th Cir. 1991). Following a similar approach, the First Circuit in *Roy v. Inhabitants of Lewiston*, 42 F.3d 691 (1st Cir. 1994), held that the defendants were entitled to immunity from plaintiff's excessive force claim, but observed that because the substantive standard and the immunity standard in such cases turns on whether the officer's conduct was objectively reasonable, the outcome probably would have been the same even if the officers had not raised an immunity defense. *Id.* at 695.

While these cases might be read to suggest that a defendant in an excessive force case can never claim immunity if the plaintiff pleads and properly supports a claim that defendants unreasonably used excessive force, that interpretation is plainly inconsistent with Supreme Court precedent. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Supreme Court held that a police officer is immune from suit for an alleged violation of the Fourth Amendment's reasonableness clause if his conduct was objectively reasonable when "assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Id.* at 639 (citation omitted). The dissent contended that the majority's formulation was incorrect because it would improperly entitle a defendant to immunity even if he reasonably, but mistakenly, concluded that his conduct was objectively reasonable. *Id.* at 648 (Stevens, J., dissenting) (contending that the majority improperly adopted "a double standard of reasonableness — the constitutional standard already embodied in the Fourth Amendment and an even more generous standard that protects any officer who reasonably could have believed that his conduct was constitutionally reasonable."). The majority countered by noting that in past applications of the doctrine of qualified immunity, the Court had afforded immunity protection to officers who had allegedly violated the Fourth Amendment. In addition, the majority explained that the confusion caused by using the terms "reasonable" and "unreasonable" to describe both immune conduct and Fourth Amendment violations did not preclude using a different "reasonable" standard for evaluating the immunity defense. *Id.* at 643.

Anderson thus requires that a court consider two factors in evaluating an immunity defense to a claim based upon the Fourth Amendment's reasonableness clause: (1) whether a constitutional violation occurred at all; and (2) " 'whether a

reasonable [officer] could have believed his actions were lawful in light of clearly established law and the information the official possessed at the time of his allegedly unlawful conduct.' " *Febus-Rodriguez*, 14 F.3d at 91 (quoting *McBride v. Taylor*, 924 F.2d 386, 389 (1st Cir. 1991)). *Accord Jones by Jones v. Webb*, 45 F.3d 178, 183 (7th Cir. 1995) (holding that qualified immunity defenses to excessive force claims must be analyzed by asking "whether a reasonable officer could have believed that his conduct was constitutional in light of the clearly established law and the information the officer possessed at the time the incident occurred." (quotations and citations omitted)). Accordingly, an officer is entitled to claim qualified immunity in a police misconduct case even if he acted unreasonably unless the law under which the officer's conduct is deemed unreasonable was clearly established when he acted.

b. Application

In *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), the Supreme Court stated that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *See also Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir.), *cert. denied*, 112 S. Ct. 1954 (1992). Relying on this principle, defendants argue that they are entitled to qualified immunity because the undisputed facts establish that when Gunter shot St. Hilaire, he reasonably believed that St. Hilaire was about to use deadly force against him. Plaintiff offers two arguments to support her claim that defendants are not entitled to summary judgment on this issue. First, she argues that a genuine factual dispute exists as to whether Gunter reasonably needed to use deadly force against

St. Hilaire to protect himself. Second, she contends that even if Gunter acted in self-defense, defendants violated the Fourth Amendment by attempting to execute the warrant in a way that unreasonably increased the likelihood that they would have to use deadly force.

Plaintiff's first argument is easily addressed. While witnesses to the shooting disagree about minor details, no one disagrees that: (1) St. Hilaire was known to carry a weapon; (2) St. Hilaire's gun was found on the seat beside him after the shooting; and (3) the record contains no direct evidence to contradict Gunter's testimony that he shot St. Hilaire only after he reached for his weapon. Plaintiff's assertions that St. Hilaire lacked sufficient time to draw his weapon and that the position of his body when he was shot demonstrates that he could not have been reaching for his gun amount to little more than speculation. As such, they are insufficient by themselves to create a genuine dispute as to whether Gunter reasonably believed he had to use deadly force against St. Hilaire to defend himself.

Plaintiff's second argument raises more troubling questions. Although she points to several alleged deficiencies in the way in which defendants planned and executed St. Hilaire's seizure, plaintiff's most potent claim is that defendants unreasonably increased the likelihood that they would need to use deadly force by approaching St. Hilaire in plain clothes, with their guns drawn and without identifying themselves as police officers.[2] Had they properly identified themselves, plaintiff argues, St. Hilaire would have offered no resistance. Moreover,

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2. Defendants have produced substantial evidence to counter plaintiff's claim. However, I assume, without deciding, that plaintiff has produced enough factual support for her claim to raise a genuine factual dispute as to whether defendants identified themselves as police officers when they approached St. Hilaire's vehicle.

she contends that defendants' failure to identify themselves was unreasonable because they could easily and safely have done so without impairing their ability to subdue and search St. Hilaire.[3]

There is some support for the proposition that a police officer who resorts to deadly force in self defense violates the Fourth Amendment if he unreasonably creates the circumstances where the use of deadly force becomes necessary. *See, e.g., Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1393) (if officer deliberately stepped in front of a moving vehicle, he may not invoke self defense as a defense to a damages claim for shooting the vehicle's driver); *Gilmere v. Atlanta*, 774 F.2d 1495, 1501 (11th Cir. 1985) (en banc) (officer cannot claim immunity from a deadly force claim by arguing self defense if the officer created the circumstances where it became necessary to use deadly force in self defense), *cert. denied*, 476 U.S. 1115, 1124 (1986). However, neither the Supreme Court nor the First Circuit Court of Appeals[4] has yet taken such a position, and there is substantial authority elsewhere to support the contrary proposition.

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3. It is well established that a person's Fourth Amendment rights are not implicated until a seizure actually occurs. *California v. Hodari D.*, 499 U.S. 621, 629 (1991); *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989). Accordingly, plaintiff does not contend that St. Hilaire's Fourth Amendment rights attached as soon as defendants drew their guns and approached his vehicle. Instead, she argues that St. Hilaire was "seized" when he was shot and, irrespective of whether Gunter was justified in using deadly force to defend himself at the moment of the shooting, the seizure violated St. Hilaire's Fourth Amendment rights because defendants' unreasonable conduct prior to the shooting increased the risk that one of them would have to use deadly force to subdue St. Hilaire.

4. Although the First Circuit held prior to *Graham* that police officers (Cont'd)

Appendix E

In dissenting from the denial of certiorari in one of the few cases supporting plaintiff's argument, then Chief Justice Burger stated that the court should have granted certiorari to reverse the decision because "an officer's conduct which makes the need for deadly force more likely does not constitutionally disable the officer from later using deadly force to defend himself." *Sampson v. Gilmere*, 476 U.S. 1124, 1125 (1986). Further, in *Drewitt v. Pratt*, 999 F.2d 774 (4th Cir. 1993), the Fourth Circuit Court of Appeals expressly rejected a claim that an officer who resorts to deadly force in self defense nevertheless violates the Fourth Amendment if he unreasonably provokes the shooting by failing to properly identify himself as a police officer. *Id.* at 778-789. Other circuits have reached similar conclusions. *See, e.g., Carter v. Buscher*, 973 F.2d 1328, 1332-33 (7th Cir. 1992); *Cole v. Bone*, 993 F.2d 1328, 1232-33 (8th Cir. 1993).

Given these conflicting precedents, the law concerning whether a police officer who legitimately uses deadly force in self-defense nevertheless violates the Fourth Amendment by unreasonably increasing the likelihood that deadly force will become necessary was not clearly established when the

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(Cont'd)
who use deadly force against people who pose *no danger* to the officers or others without first providing a warning violate the victims' rights to substantive due process, *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553 (1st Cir. 1989), Gunter's reasonable belief that St. Hilaire was about to shoot him distinguishes this case from *Gutierrez-Rodriguez*. Also, although the Supreme Court held in *Garner* that the Constitution requires police to provide a warning, *if feasible*, before using deadly force when a dangerous suspect flees or threatens them or others, *Garner*, 471 U.S. at 11-12, no warning was feasible in the split-second between when Gunter believed St. Hilaire was about to shoot him and he acted in self defense. Thus, neither *Gutierrez* nor *Garner* provide clearly established law applicable to the circumstances in this case.

defendants acted. *See Sullivan v. Horta*, 4 F.3d 2, 13 (1st Cir. 1993). Accordingly, the defendants are entitled to prevail on their qualified immunity defense.

B. *Municipal Defendants*

Plaintiff alleges that the Town of Belmont, the City of Laconia, and Belknap County are "jointly and severally liable" on her federal claims with the individual defendants. However, these claims allege solely a respondeat superior theory which is not cognizable under § 1983. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 695 (1978); *Manarite v. Springfield*, 957 F.2d 953, 958 (1st Cir.), *cert. denied*, 113 S.Ct. 113 (1992). These claims are dismissed.

C. *Pendent State Claims*

Having dismissed plaintiff's federal claims, I decline to retain supplemental jurisdiction over her remaining state law claims. *See* 28 U.S.C.A. § 1367(c)(3). Accordingly, I dismiss these claims without prejudice.

IV. *CONCLUSION*

For the foregoing reasons defendants' motions for summary judgment (documents 16 and 19) are granted as to all of plaintiff's federal claims. Plaintiff's state law claims are dismissed without prejudice.

SO ORDERED.

s/ Paul Barbadoro
Paul Barbadoro
United States District Judge

Appendix E

March 31, 1995
cc: Donald Perreault, Esq.
Wayne Beyer, Esq.
A. Gerard O'Neil, Esq.
David Bownes, Esq.

No. 95-1653

(2)

Supreme Court, U.S.
FILED
MAY 22 1996

In the Supreme Court of the United States

OCTOBER TERM, 1995

KATHY ST. HILAIRE, INDIVIDUALLY AND AS EXECUTRIX FOR THE ESTATE OF PHILIP ST. HILAIRE,

PETITIONER,

v.

CITY OF LACONIA, LACONIA, NEW HAMPSHIRE, TOWN OF BELMONT, BELMONT, NEW HAMPSHIRE, COUNTY OF BELKNAP, LACONIA, NEW HAMPSHIRE, DETECTIVE DAVID A. GUNTER, OF THE LACONIA POLICE DEPARTMENT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, SERGEANT BRIAN LOANES, OF THE TOWN OF BELMONT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, SERGEANT DAVID NIELSEN, OF THE TOWN OF BELMONT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, DEPUTY SHERIFF ROBERT DUPUIS, JR., OF THE BELKNAP COUNTY SHERIFF'S DEPARTMENT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, DEPUTY SHERIFF DANIEL COLLIS, OF THE BELKNAP COUNTY SHERIFF'S DEPARTMENT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS, CITY OF LACONIA, TOWN OF BELMONT, DETECTIVE DAVID A. GUNTER, SERGEANT BRIAN LOANES, AND SERGEANT DAVID NIELSEN, IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petition for Certiorari should be granted, when the First Circuit Court of Appeals correctly relied upon the Supreme Court's recent decision in *Wilson* v. *Arkansas* in granting qualified immunity to the individually named respondents in their individual capacities.

2. Whether, in view of the correctness of the First Circuit Court of Appeals' Decision, the Supreme Court should grant certiorari to decide whether the objective reasonableness test for qualified immunity in Fourth Amendment excessive force cases is the same as the objective reasonableness test applied on the merits, or a more generous test for qualified immunity governs as in Fourth Amendment warrant cases.

3. Whether, in view of the correctness of the First Circuit Court of Appeals' decision, the Supreme Court should grant certiorari to determine when Fourth Amendment scrutiny should begin in a self-defense shooting case: at or near the time of the seizure (i.e., shooting) or the events leading up to it.

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APPENDIX

Appendix A — Errata sheet from the United States Court of Appeals for the First Circuit, Amending Opinion of the Court, Issued on December 1, 1995 1a

In the
Supreme Court of the United States

OCTOBER, TERM, 1995

No. 95-1653

KATHY ST. HILAIRE, INDIVIDUALLY AND AS EXECUTRIX FOR THE ESTATE OF PHILIP ST. HILAIRE,
PETITIONER,

v.

CITY OF LACONIA, LACONIA, NEW HAMPSHIRE, TOWN OF BELMONT, BELMONT, NEW HAMPSHIRE, COUNTY OF BELKNAP, LACONIA, NEW HAMPSHIRE, DETECTIVE DAVID A. GUNTER, OF THE LACONIA POLICE DEPARTMENT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, SERGEANT BRIAN LOANES, OF THE TOWN OF BELMONT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, SERGEANT DAVID NIELSEN, OF THE TOWN OF BELMONT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, DEPUTY SHERIFF ROBERT DUPUIS, JR., OF THE BELKNAP COUNTY SHERIFF'S DEPARTMENT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, DEPUTY SHERIFF DANIEL COLLIS, OF THE BELKNAP COUNTY SHERIFF'S DEPARTMENT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,
RESPONDENTS.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is officially reported as *Kathy St. Hilaire, etc., Plaintiff, Appellant* v. *City of Laconia, et al., Defendants, Appellees,* 71 F.3d 20 (1st Cir. 1995), and appears as Appendix D of the Petition for a Writ of Certiorari.

The decision of the United States District Court for the District of New Hampshire is officially reported as *Kathy St. Hilaire* v. *City of Laconia,* 885 F. Supp. 349 (D. N.H.1995), and appears as Appendix E of the Pet. for Cert.

STATEMENT OF JURISDICTION

The judgment of the First Circuit Court of Appeals affirming the District Court for the District of New Hampshire's original judgment in favor of the defendants (App. E) was entered on December 1, 1995. (App. C.) By order dated December 15, 1995, the First Circuit enlarged the time for filing a petition for rehearing and suggestion for a rehearing en banc until December 29, 1995. (App. B.) By order dated January 5, 1996, the First Circuit denied the petition for rehearing and the suggestion for the holding of a rehearing en banc. (App. A.)

The jurisdiction of the United States Supreme Court has been invoked pursuant to 28 U.S.C. §1254 and 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Three police officers in plain clothes and one in uniform rushed toward Philip St. Hilaire's vehicle. St. Hilaire, in the driver's seat, began to pull a gun on the officer by the passenger window. The officer shot in self-defense, giving rise to this unreasonable seizure claim under the Fourth Amendment. The issue below and in petitioner's Petition for Certiorari is whether the officers violated clearly established constitutional rights of which reasonable officers would have known.

Statement of Facts

The Belknap County Sheriff's Office conducted an investigation of drug sales from the business premises of Philip St. Hilaire, known as Laconia Auto Wrecking in Belmont, New Hampshire. Two controlled buys of cocaine and other corroborating information culminated in Sheriff's Deputy Robert Dupuis obtaining a search warrant at the Laconia District Court. The warrant, as authorized by the local judge, gave permission to search the person and business premises of Philip St. Hilaire for evidence of cocaine and drug sales.

That same day, April 27, 1990, Deputy Dupuis led a pre-raid planning meeting at the Sheriff's Department that included Respondents Detective David A. Gunter of the Laconia Police Department, Respondents Sergeant Brian Loanes and Sergeant David Nielsen of the Belmont Police Department, and other officers. It was agreed that the perimeter would be secured by uniformed officers in marked cruisers. Sergeant Nielsen, in uniform, and Sergeant Loanes and Deputy Dupuis in plain clothes would execute the warrant. Detective Gunter would then enter the premises with his drug dog. St. Hilaire was known to be armed and possibly dangerous.

Immediately following the meeting, the officers reconvened at the location of the search. Deputy Dupuis, Sergeant Loanes and Sergeant Nielsen positioned themselves in the woods behind Laconia Auto Wrecking. Belknap County Deputy Sheriff Daniel Collis monitored activity from across the street and was in radio contact with the execution team. Deputy Collis observed several people approach the door into Laconia Auto Wrecking. They shook the door, after which it appeared that someone inside unlocked it to allow entrance. Contrary to expectations, the door was locked, which required consideration of a breached entry. That contributed to the potential risk, as did the one-way glass on the building, which allowed the occupants to see out, but prevented the officers from seeing in. Detective Gunter was added to the raid team for reinforcement.

Deputy Collis then saw St. Hilaire lock the front of his business, enter the parking lot, and head toward his vehicle. Upon learning of this development from Deputy Collis over his portable radio, Deputy Dupuis, the raid leader, gave the command, "Let's go."

The execution team ran out of the woods and toward the rear of St. Hilaire's vehicle. Detective Gunter headed toward the rear passenger side, Sergeant Nielsen, the uniformed officer, headed toward the rear driver's side, and Sergeant Loanes and Deputy Collis followed. All had badges visible

and guns drawn. Most shouted or heard others yell combinations of "Phil," "Police," "Freeze," "Hold it." Once aligned with the passenger side window, Detective Gunter again shouted, "Hold it. Police," or words like that. St. Hilaire was facing forward, seated in the driver's seat, with the engine running, as officers approached.

At the window, Gunter held up his badge in his left hand and a revolver in his right. St. Hilaire turned to his right, making eye contact with Detective Gunter. St. Hilaire reached with his right hand to his right hip, which exposed what Detective Gunter believed to be a .45 automatic revolver. Detective Gunter shot — once — as Philip St. Hilaire reached for his weapon.

Immediately after the shooting, Chief McCarty of the Belmont Police Department removed Philip St. Hilaire's weapon from the front seat of the vehicle, where it lay next to St. Hilaire. Prior to its removal, Sergeant Nielsen observed that St. Hilaire's right hand was on top of the gun, which was on the seat to St. Hilaire's right. Sergeant Nielsen recognized that St. Hilaire was wounded in the throat. St. Hilaire was paralyzed from the neck down as a result of a single bullet lodged in his vertebra. He died approximately a year and a half later.

Procedural History

The plaintiff filed suit in the United States District Court for the District of New Hampshire under the auspices of 42 U.S.C. §1983, seeking damages against three municipalities and five individual officers. She alleged unreasonable search and seizure in violation of the Fourth Amendment on behalf of her decedent, with supplemental state law claims for negligence, intentional infliction of emotional distress and loss of consortium. The defendants filed motions for summary judgment based *inter alia* on qualified immunity.

The District Court granted the defendants' motions for summary judgment and dismissed pendent state law claims without prejudice. (App. E.) On the plaintiff's illegal search

warrant claim, the District Court found probable cause for the issuance of the warrant, even if the affidavit in support had been corrected to include allegedly omitted material. The District Court granted summary judgment in favor of the individual defendants on the illegal warrant claim based upon qualified immunity. (App. E at 34a.)

On the plaintiff's excessive force claim, the plaintiff contended that there were material facts in dispute that should preclude summary judgment in two separate areas: (1) that there were disputed facts regarding whether in fact St. Hilaire was reaching for a weapon, which questioned the authority of Detective Gunter to shoot in self-defense; and (2) that there were disputed facts regarding whether the defendants were identifying themselves as police officers. If not, according to the plaintiff's thesis, the "defendants unreasonably increased the likelihood that they would need to use deadly force by approaching St. Hilaire in plain clothes, with their guns drawn and without identifying themselves as police officers." (App. E 38a.)

The first argument the District Court easily dismissed as speculation. The plaintiff's factual allegations were insufficient to "create a genuine dispute as to whether Gunter reasonably believed he had to use deadly force against St. Hilaire to defend himself." (App. E at 38a.)

The plaintiff's second argument — that the officers unreasonably increased the foreseeable risk that St. Hilaire would react to their presence with violence — raised "more troubling questions" for the District Court. (App. E at 38a.) Acknowledging the existence of a fact dispute over whether the defendants identified themselves, the District Court assumed without finding that they had not (App. E at 38a n.2), then proceeded to determine whether the defendants nevertheless were eligible for a qualified immunity defense.

Citing *Anderson* v. *Creighton*, 483 U.S. 635 (1987) and lower federal court decisions, the District Court concluded that a more liberal level of review is sanctioned under quali-

fied immunity than the "objective reasonableness" test on merits consideration under the Fourth Amendment.

> Accordingly, an officer is entitled to claim qualified immunity in a police misconduct case even if he acted unreasonably unless the law under which the officer's conduct is deemed unreasonable was clearly established when he acted.

(App. E at 37a.) Noting "conflicting precedents" among federal courts, the District Court found that:

> [T]he law concerning whether a police officer who legitimately uses deadly force in self-defense nevertheless violates the Fourth Amendment by unreasonably increasing the likelihood that deadly force will become necessary was not clearly established when the defendants acted.

(App. E at 40a-41a.) Therefore, defendants in their individual capacities were entitled to summary judgment on the basis of qualified immunity. (App. E at 41a.)

The District Court dismissed the municipal liability claims against the City of Laconia, Town of Belmont, and Belknap County, as defectively premised on a *respondeat superior* theory. (App. E at 41a.) The Court dismissed the supplemental state law claims without prejudice pursuant to 28 U.S.C. §1367(c)(3). (App. E at 41a.) Those supplemental state law claims for negligence, intentional infliction of emotional distress and loss of consortium have been re-brought in Belknap County Superior Court in Laconia, New Hampshire.

The plaintiff appealed the District Court decision in favor of the defendants to the First Circuit Court of Appeals. The First Circuit affirmed summary judgment on behalf of the defendants on the unreasonable search (App. D at 34a) and municipal liability claims. (Respondents' Exhibit A, Amended Opinion at 1a.)

The First Circuit also affirmed the District Court's grant

of summary judgment in favor of the defendants sued personally. However, the Court of Appeals opined that both the defendants and District Court focused too narrowly on the moment of the shooting. (App. D at 18a—19a.) The issue on qualified immunity was not, as the District Court held, "whether there was any clearly established constitutional duty . . . to avoid creating situations which increased the risk of use of deadly force" (App. D at 19a), but rather, whether, at the time of the shooting in 1990, there was a clearly established constitutional obligation that police announce their identity and purpose as they approached St. Hilaire to execute the search warrant. (App. D at 21a.)

Framing the issue in that manner permitted the First Circuit a broader review of events, starting essentially at the time the one uniformed and three plain clothes officers rushed the St. Hilaire vehicle. As the District Court, the First Circuit found that whether the defendants yelled "Police," "Hold it," "Freeze," and the like was a disputed fact, but that it was not material to the outcome (App. D at 16a—17a), and therefore would not preclude the defendants from receiving qualified immunity if they violated no clearly established constitutional rights.

At the heart of the plaintiff's position was that a sort of out-of-doors equivalent to the common law knock-and-announce rule governed. Following the plaintiff's invitation to refer to this Court's recent decision in *Wilson* v. *Arkansas*, 115 S. Ct. 1914 (1995) for guidance, the First Circuit assumed without finding that the case controlled. (App. D at 21a.)

Nevertheless, to the extent that *Wilson* held that the common law knock-and-announce rule regarding the entry of dwellings formed part of the reasonableness analysis under the Fourth Amendment, that constitutional principle was not clearly established until that case was decided in 1995. (App. D at 21a—22a.) Because the defendants sued personally did not violate clearly established constitutional rights of which reasonable police officers would have known as they approached the St. Hilaire vehicle in 1990, they were pro-

tected from suit and judgment by qualified immunity. (App. D at 23a.)

In her Petition for Certiorari, the plaintiff has not raised the judgment below in favor of the municipalities or the judgment below in favor of all defendants on the unreasonable search claim. It is only the grant of qualified immunity on the individual capacity claims on the unreasonable force issue for which review is sought.

ARGUMENT

I. The Petition for Certiorari Should Not Be Granted, Because the First Circuit Court of Appeals Correctly Relied upon the Supreme Court's Recent Decision in *Wilson* v. *Arkansas* in Granting Qualified Immunity to the Individually Named Respondents in Their Individual Capacities.

Respondents herein are Detective David Gunter of the City of Laconia and Sergeant Brian Loanes and Sergeant David Nielsen of the Town of Belmont, individual officers sued in their individual capacities. Since the First Circuit Court of Appeals correctly applied this Court's recent decision in *Wilson* v. *Arkansas*, in granting qualified immunity on summary judgment, the Petition for Certiorari should be denied.

This case was initially brought with both unreasonable search and unreasonable seizure claims under the Fourth Amendment. Both the District Court and the Court of Appeals have awarded summary judgment on behalf of the defendants on the petitioner's claim challenging the validity of the search warrant. (App. E at 34a; App. D at 24a.) The petitioner elected not to seek review on certiorari of the illegal search warrant claim, and therefore that issue is not before this Court.

Nor are there municipal liability claims pending against the City of Laconia or the Town of Belmont. Following *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), both

the District Court and the Court of Appeals awarded summary judgment on behalf of the City of Laconia and Town of Belmont. (App. E at 41a; Respondents' App. A, Amended Opinion at 1a.) As a consequence of those rulings, judgment was automatically rendered in favor of Respondents Detective Gunter, Sergeant Loanes and Sergeant Nielsen to the extent they had been sued in their official capacities. *See Hafer* v. *Melo*, 502 U.S. 21 (1991); *Kentucky* v. *Graham*, 473 U.S. 159 (1985); *Brandon* v. *Holt*, 469 U.S. 464 (1985). There were no supervisory claims. Because the petitioner has not sought review on certiorari of the judgment in favor of the defendants on the municipal and official capacity claims, those claims are not before this Court.

The only surviving claims are the unreasonable seizure (i.e., shooting) claims against individual respondents sued in their individual capacities, to which qualified immunity is a complete and early defense. *See Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). One of the plaintiff's arguments against Detective Gunter individually was that there were disputed issues of material fact precluding summary judgment on the question of whether Detective Gunter reasonably believed that it was necessary to shoot Philip St. Hilaire in self-defense at the moment St. Hilaire reached for his gun. Both the District Court and the Court of Appeals found the argument to be without merit (App. E at 38a; App. D at 16a), and the Petitioner has not re-raised the argument in the Petition for Certiorari. Thus, what remains of this case is the First Circuit Court of Appeals' response to the petitioner's core claim: whether Respondent Nielsen in uniform and Respondents Gunter and Loanes in plain clothes could have maintained the objectively reasonable belief that they were complying with clearly established constitutional principles as they rushed toward St. Hilaire's vehicle, allegedly without announcing their identity and purpose. *See Harlow*, 457 U.S. at 818. Since the answer is in the affirmative, the opinion of the Court of Appeals is correct, and certiorari should be denied.

Because St. Hilaire was in the driver's seat of a vehicle with the engine running, he was not "seized" within the meaning of the Fourth Amendment until he was shot. A seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied.*" *Brower* v. *County of Inyo*, 489 U.S. 593, 597 (1989) (emphasis in original). "An arrest requires *either* physical force . . . *or* where that is absent, *submission* to the assertion of authority. *California* v. *Hodari D.*, 499 U.S.621, 626 (1991) (emphasis in original). It is not a seizure, but an unreasonable seizure that imposes liability. *Graham* v. *Conner*, 490 U.S. 386 (1989) established that "*all* claims that law enforcement officers have used excessive force — deadly or not — . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard. . . . . 490 U.S. at 395 (emphasis in original). *Tennessee* v. *Garner*, 471 U.S. 1 (1985) advised that deadly force is reasonable "if the suspect threatens the officer with a weapon . . . if, where feasible, some warning has been given." 471 U.S. at 11-12. However, the absence of a contemporaneous warning does not defeat the justification for the use of lethal force, when it is necessary. *See, e.g., McLenagan* v. *Karnes*, 27 F.3d 1002, 1007 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 581 (1994); *Kruger* v. *Fuhr*, 991 F.2d 435, 440 (8th Cir. 1993). No Fourth Amendment rule requires that only a uniformed officer must execute a warrant or perform a seizure. *Cf. Drewitt* v. *Pratt*, 999 F.2d 774, 780 (4th Cir. 1993). The Constitution does not mandate that officers verify that a subject has visually or audibly identified them as police. *Cf. Sledd* v. *Lindsay*, 864 F.Supp. 819, 830 (N.D. Ill. 1994).

Contrary to the position the petitioner urges upon this Court, Fourth Amendment jurisprudence does not state that officers executing a search warrant must announce their identity and purpose. Eschewing a *per se* reasonableness rule, this Court in *Wilson* taught that adherence to the knock-and-announce rule is merely a factor which may be considered in a reasonableness analysis under the Fourth Amendment. *Wilson*, 115 S. Ct. at 1915; *see also, Sabbath* v. *United States*,

391 U.S. 585 (1968); *Ker* v. *California*, 374 U.S. 23 (1963).

However, a reason for not observing the knock-and-announce rule exists where evidence such as drugs, may be easily destroyed. *See, e.g., Ker*, 374 U.S. at 56; *United States* v. *Sagaribay*, 982 F.2d 906 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 160 (1993); *United States* v. *Bonner*, 874 F.2d 822 (D.C. Cir. 1989). Another exception exists when the subject of the search is thought to be armed, or there is some other reason to believe that following the rule will increase, rather than decrease the level of danger. *See, e.g., Sabbath*, 391 U.S. at 591; *Ker*, 374 U.S. at 56-58, *Miller* v. *United States*, 357 U.S. 301, 309 (1958); *United States* v. *Kane*, 637 F.2d 974 (3rd Cir. 1981); *cf. Lavoie* v. *Town of Hudson*, 740 F.Supp. 88, 93-94 (D. N.H. 1990). Thus, the Fourth Amendment reasonableness standard recognizes occasions when the need to surprise may overcome the need to identify and announce.

It is in the context of these Fourth Amendment principles that the First Circuit considered the plaintiff's contention that the officers' failure to identify themselves as such caused the constitutionally excessive use of force. The petitioner asserts that the courts below committed reversible error by awarding summary judgment to the defendants in the face of a factual dispute over whether the respondents identified themselves. *See* Fed. R. Civ. P. 56(c); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The First Circuit recognized that the defendants had offered substantial evidence that they shouted combinations of "Phil," "Police," "Freeze," as they ran toward St. Hilaire's vehicle, but joined the District Court in assuming without deciding that the defendants had not succeeded in announcing their identity and purpose to St. Hilaire. Nevertheless, both the District Court and the First Circuit found the identification issue immaterial to summary judgment disposition. (App. D. at 11a—11b, 16a—18a; App. E at 28a—29a, 38a n.2.)

Even adopting the plaintiff's version of the facts for the purpose of resolution on summary judgment, the First Circuit

found no violation of constitutional rights that were clearly established at the time of the incident in 1990. Assuming without finding that this Court's 1995 decision in *Wilson* v. *Arkansas* (which concerns the execution of warrants on dwellings not vehicles) applied to the plaintiff's case, the plaintiff's theory of recovery succeeded only if the notice requirement was permanently affixed to the Fourth Amendment analysis in 1990, and the *Wilson* decision merely restated existing law. However, this Court in *Wilson* announced that it had never previously held that the knock-and-announce rule was an element of the reasonableness inquiry. *Wilson*, 115 S. Ct. at 1918. (App. B at 21a—22a.)

If the principle was not clearly established as to dwellings, its application to police officers approaching vehicles was even less clear. (*See* App. D at 21a n.6.) Thus, the First Circuit correctly ruled that Respondents Detective Gunter, Sergeant Nielsen and Sergeant Loanes were entitled to qualified immunity on the plaintiff's unreasonable seizure claims. (App. D at 23a.) Certiorari should be denied based upon the First Circuit's correct application of this Court's recent decision in *Wilson*.

The Court of Appeals' decision drew no distinction among respondents and yet it is appropriate to do so. Sergeant Nielsen was in uniform and the argument that he was not identifiable as a police officer is unconvincing. Sergeant Loanes was in plain clothes but, as Sergeant Nielsen, had no physical contact with Philip St. Hilaire, and neither can be said to have "seized" him in a constitutional sense. At most, those respondents are chargeable with executing a search warrant in an unreasonable manner, and not committing the alleged unreasonable seizure that is the source of the plaintiff's damages claim. Only Detective Gunter seized the plaintiff, but the seizure was reasonable. Assuming without admitting that he failed to identify himself, circumstances placed him at the window of St. Hilaire's vehicle, and in the blink of an eye, he had to decide whether to shoot or be shot. For reasons

stated by the First Circuit, he was properly accorded qualified immunity.

II. In View of the Correctness of the First Circuit Court of Appeals' Decision, the Supreme Court Should Not Grant Certiorari to Decide Whether the Objective Reasonableness Test for Qualified Immunity in Fourth Amendment Excessive Force Cases Is the Same as the Objective Reasonableness Test Applied on the Merits, or a More Generous Test for Qualified Immunity Governs as in Fourth Amendment Warrant Cases.

The petitioner asserts that the federal courts are in conflict as to how the qualified immunity defense should apply to excessive force cases under the Fourth Amendment, some stating that the same objective reasonableness test governs on the merits as on qualified immunity, with other courts holding that even an officer whose conduct violated the Fourth Amendment may avail himself or herself of the qualified immunity defense. While this is an important and unsettled area of federal law, this case need not be the vehicle for its resolution, since the decision below reached a correct result.

The scope and application of the qualified immunity defense to excessive force claims under the Fourth Amendment is a matter of some debate. In *Graham*, this Court did not reach the question of whether qualified immunity was a defense to a Fourth Amendment excessive force claim. 490 U.S. at 399, n.12. Lower federal courts, however, permit the qualified immunity defense to excessive force claims, with disagreement centering around whether the objective reasonableness standard for the substantive Fourth Amendment claim is synchronous with the "objective reasonableness" standard for qualified immunity.

In Fourth Amendment cases involving probable cause for searches and arrests, this Court has plainly determined that, while a Fourth Amendment violation may have occurred, the

offending officer is nevertheless entitled to the benefit of qualified immunity. Under the classic articulation of the qualified immunity defense, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. However, the Supreme Court has provided liberal amplifications of the rule. *Malley* v. *Briggs*, 475 U.S. 335 (1986), instructed that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." 475 U.S. at 341. Immunity will be extended, "unless *no* reasonably competent officer would have concluded" that the conduct complied with the Constitution. 475 U.S. at 341 (emphasis added). However, "if officers of reasonable competence could disagree" on whether the conduct was constitutional, immunity applies. 475 U.S. at 341.

Again, choosing its language carefully, this Court in *Anderson* v. *Creighton*, 483 U.S. 635 (1987), stated that the pertinent question is whether "a reasonable officer *could* have believed . . . [the conduct] to be lawful, in light of clearly established law and the information the . . . officers possessed". 483 U.S. at 641 (emphasis added); *see also Hunter* v. *Bryant*, 112 S. Ct. at 536. Under *Anderson*, immunity applies if officers reasonably, but mistakenly believe that their conduct complies with the Fourth Amendment. 483 U.S. at 641. The dissent in *Anderson* criticized the Court for fashioning this "double standard" for Fourth Amendment analysis, one for merits consideration and the other for qualified immunity. 483 U.S. at 659. In sum, in the Fourth Amendment areas already addressed by the Supreme Court, this Court has indicated that, notwithstanding a constitutional violation, an individual police officer may be entitled to qualified immunity.

Lower federal courts, in applying immunity to excessive force cases, have assumed that the defense exists. *See, e.g., In re: City of Philadelphia Litigation*, 49 F.3d 945, 972 (3d

Cir. 1995); *Kelly* v. *Bender*, 23 F.3d 1328, 1331 (8th Cir. 1994); *Jackson* v. *Beaumont Police Department*, 958 F.2d 616, 620 (5th Cir. 1992) ("Qualified immunity is a defense to an excessive use of force claim under the Fourth Amendment"); *Finnegan* v. *Fountain*, 915 F.2d 817, 823-24 (2nd Cir. 1990).

Some courts have reasoned that the "objective reasonableness" standard is the same on the substantive claim as it is on the qualified immunity defense. *See, e.g., Wardlaw* v. *Pickett*, 1 F.3d 1297, 1303 (D.C. Cir. 1993) (*Bivens* action) ("[T]he scope of qualified immunity must be evaluated using the same 'objective reasonableness' criteria with which *Graham* directs us to scrutinize an officer's actions under the Fourth Amendment. We believe that standard provides the test for evaluating both the scope of the officer's qualified immunity as well as the plaintiff's claim of excessive force under the fourth amendment"), *cert. denied*, 114 S. Ct. 2672 (1994); *Hopkins* v. *Andaya*, 958 F.2d 881, 885, n.3 (9th Cir. 1992); *Austin* v. *Hamilton*, 945 F.2d 1155, 1161-62 (10th Cir. 1991); *Quezada* v. *County of Bernalillo*, 944 F.2d 710, 718 (10th Cir. 1991).

However, others have adopted a more generous standard in considering the actions of individual officers. They speak not in terms of what a reasonable officer would or should have done, but could have done, and afford immunity unless *no* reasonable police officer *could* have believed that his or her conduct complied with the Constitution. *See, e.g., Slattery* v. *Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) ("A police officer should prevail on an assertion of qualified immunity if a reasonable officer possessing the same information *could* have believed that his conduct was lawful.... If a reasonable officer could have found probable cause to believe that [the plaintiff] presented a serious threat of personal harm at the time that [the officer] pulled the trigger, then, as a matter of law, the [officer] is entitled to qualified immunity"); *Jones* v. *Webb*, 45 F.3d 178, 183 (7th Cir. 1995); *Kelly*, 23 F.3d at 1331; *Febus-Rodriguez* v. *Betancourt-Lebron*, 14 F.3d 87,

91 (1st Cir. 1994); *Finnegan*, 915 F.2d at 823-24 ("even if the jury finds [the defendant officer] to have used constitutionally excessive force, it is for the district court to determine whether the unlawfulness of his conduct should have been apparent to [the officer] at the time"); *Wyche* v. *City of Franklinton*, 837 F. Supp.137, 141-42 (E.D. N.C. 1993).

Even those courts stating that there is only one tier of analysis frequently imply that immunity could be invoked if *any* officer could reasonably have believed that the conduct comported with clearly established law. *See, e.g., Wardlaw*, 1 F.3d at 1303 ("excessiveness of the force is so apparent that no reasonable officer could have believed in the lawfulness of his actions"); *Street* v. *Parham*, 929 F.2d 537, 540 (10th Cir. 1991) ("No officer could reasonably believe that the use of unreasonable force did not violate clearly settled law").

The decisions of this Court in the warrant area and those of lower federal courts in excessive force cases show an intent to protect under the doctrine of qualified immunity even those police officers who operate on the outer perimeter of reasonable conduct. It may be that a citizen's Fourth Amendment right to be free of excessive force was violated when scrutinized under the "objective reasonableness" test on the merits, and yet the individual officer involved should be relieved from personal liability for public policy reasons if that officer *could* have maintained the "objectively reasonable" belief that his or her conduct complied with then-existing federal law. One test reviews the merits to determine whether there was a constitutional violation. The other, more liberal standard reviews the conduct of an individual state actor and provides immunity if reasonable police officers could differ as to whether there was a violation of clearly established constitutional law. The distinction is similar to the difference between *de novo* and clearly erroneous review. In some cases, where the only defendants are police officers sued in their individual capacities, that may mean that the plaintiff does not recover. In others, where for example, a municipal defendant is not eligible for the defense, *see Owen* v. *City of*

Independence, 445 U.S. 622 (1980), it does not, because liability may be imposed upstream. *Cf. Hinton* v. *City of Elwood*, 997 F.2d 774, 782-83 (10th Cir. 1993); *Medina* v. *Denver*, 960 F.2d 1493, 1499-1500 (10th Cir. 1992); *Hopkins*, 958 F.2d at 888.

Returning to the case at hand as an example, even assuming without admitting that Detective Gunter had failed to announce his authority and purpose as he approached St. Hilaire's vehicle with his badge in one hand and his gun in the other, reasonable police officers could differ as to whether he was justified in shooting Philip St. Hilaire when it appeared that St. Hilaire reached for his gun. To fail to award immunity under that situation could make for timorous, ineffective police officers. On the other hand, if a constitutionally defective policy or custom regarding how warrants were executed, or supervisory "deliberate indifference" as to whether the manner in which the raid was planned and executed was affirmatively linked to the unnecessary use of deadly force against Philip St. Hilaire, then a municipality or the raid supervisors could be held liable for the Fourth Amendment violation, while relieving Detective Gunter of personal liability for simply having been positioned in the wrong place at the wrong time: a conduit for the constitutional deprivation but not himself a cause. *See Hinton, supra; Medina, supra; Hopkins, supra.*

However, that is not the posture in which this case has reached this Court, and therefore the issues raised need not be decided on certiorari. Only individual officers in their individual capacities are respondents and irrespective of whether, upon further scrutiny, this Court would find an underlying Fourth Amendment violation, the only issue squarely before the Court would continue to be whether the First Circuit Court of Appeals properly granted qualified immunity, and it did.

In finding that the identify and announce rule was not incorporated into the reasonableness analysis under the Fourth Amendment until *Wilson*, the First Circuit rejected

the petitioner's most compelling thesis. Moreover, the Court of Appeals opinion does not rely upon a difference between the objective reasonableness standard for liability and a qualified immunity defense. In fact, in a footnote, the Court said the tests are "most likely the same. . . . In any event, we draw on the cases decided in the liability context for guidance in deciding the qualified immunity question." (App. D at 14a n.2.) Consequently, although the question of differing standards of objective reasonableness is an interesting and important one, its resolution is not necessary to the disposition of this case.

III. In View of the Correctness of the First Circuit Court of Appeals' Decision, the Supreme Court Should Not Grant Certiorari to Determine When Fourth Amendment Scrutiny Should Begin in a Self-defense Shooting Case: at or Near the Time of the Seizure (i.e., Shooting), or the Events Leading up to it.

The petitioner has contended that the First Circuit erred in not subjecting the entire series of events that preceded the shooting to Fourth Amendment scrutiny under the "objective reasonableness" test of *Graham* and *Garner* and has suggested that the following factors should have been considered:

> (1) the manner in which the officers conducted their search; (2) the method of conducting their seizure; (3) the preceding circumstances leading to use of deadly force, including lack of identification as state officials; (4) the decedent's prior cooperative encounters with law enforcement agents; (5) the potential risk of flight by decedent; (6) the severity of the crime; (7) the lack of an immediate threat to officers or others.

(Pet. for Cert. at 9.) The petitioner proposed this list of alternatives for providing notice of police presence, identity and purpose to St. Hilaire:

> audibly announcing their presence with an amplifier; warning St. Hilaire by sounding their sirens; insuring that a uniformed officer be the first to approach his car; or choosing any other effective method of providing notice.

(Pet. for Cert. at 18.)

The petitioner thus raises the issue of when Fourth Amendment scrutiny attaches in an intentional shooting case against individual police defendants. It is the within respondents' position that this issue need not be addressed on certiorari, because the petitioner has misunderstood the First Circuit's decision. The ruling was based upon the defense of qualified immunity, which is available to defendants sued in their individual capacities. The defense prevails whether or not there was an underlying constitutional violation, so long as the federal right violated was not clearly established at the time of the incident. *Harlow, supra.* Although the First Circuit stated that both the defendants and the District Court erred in focusing on the moment of the shooting and that the law of the Circuit would evaluate the objective reasonableness of officer conduct in the light of earlier events, such a review was unnecessary to the Court's decision. Where, as here, a constitutional right crucial to the plaintiff's recovery is not clearly established at the time of the incident, the plaintiff's claim necessarily fails, whether or not the entire incident was reviewed for reasonableness under the Fourth Amendment. The centerpiece of the plaintiff's theory of recovery, the need for police to announce their authority and purpose, was not clearly established at the time, and thus the individual capacity claims against Respondents Detective Gunter, Sergeant Loanes and Sergeant Nielsen should not succeed.

The petitioner nevertheless asks this Court to grant certiorari to adopt a rule that at least the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits have considered and rejected. In lethal force scenarios leading ultimately to a seizure, decisions of these courts apply Fourth Amendment

scrutiny to the seizure itself, and not to whether antecedent events involved poor decisions or violations of standard operating procedures; whether better, less dangerous alternatives were available; or whether the officer who shot was adequately identifiable audibly or visually. Under these decisions, the shooting was the seizure and only that received Fourth Amendment review under a reasonableness test. *See, e.g.*, *Schulz* v. *Long*, 44 F.3d 643, 648 (8th Cir. 1995) ("[T]he Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general. Consequently, we scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment"); *Roy* v. *Inhabitants of City of Lewiston*, 42 F.3d 691, 696 (1st Cir. 1994) (although "[t]he police may have done the wrong thing . . . they were not 'plainly incompetent' nor were their actions 'clearly proscribed'"); *Scott* v. *Henrich*, 39 F.2d 912, 915 (9th Cir. 1994) (requiring officers to choose the least intrusive alternative would "induce tentativeness[,] . . . deter police from protecting the public . . . [and] entangle the courts in endless second-guessing of police decisions . . ."), *cert. denied*, 115 S. Ct. 612 (1995); *Plakas* v. *Drinsky*, 19 F.3d 1143, 1150 (7th Cir. 1994) ("it is from that point on [plaintiff's decedent's cocking a poker over his head and charging the officer] that we judge the reasonableness of the use of deadly force in light of all that the officer knew"), *cert. denied*, 115 S. Ct. 81 (1994); *Drewitt* v. *Pratt*, 999 F.2d 774, 780 (4th Cir. 1993) (whether officer's failure to identify himself was contributory was considered irrelevant by the court, the issue being, "whether at the moment of the shooting [the officer] had probable cause to believe [the suspect] posed a threat of death or serious bodily harm to him"); *Cole* v. *Bone*, 993 F.2d 1328, 1334 (8th Cir. 1993) ("[The officer's] decision to use deadly force might not have been the most prudent course of action . . . The Constitution, however, requires only that the seizure be objectively reasonable . . ."); *Carter* v. *Buscher*, 973 F.2d 1328, 1333 (7th Cir. 1992) ("Even if the defendants concocted a dubious scheme to bring about [the suspect's] arrest,

it is the arrest itself and not the scheme that must be scrutinized for reasonableness under the Fourth Amendment"); *Tom* v. *Voida*, 963 F.2d 952, 962 (7th Cir. 1992) (regardless of preceding events, less intrusive means not available at time of shooting); *Fraire* v. *City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992) ("regardless of what had transpired up until the shooting itself, [the suspect's] movements gave the officer reason to believe, at least at that moment, that there was a threat of physical harm), *cert. denied*, 113 S.Ct. 462 (1992); *Rhodes* v. *McDaniel*, 945 F.2d 117, 120 (6th Cir. 1991) (estate argued that officer created need for use of excessive force; the Court of Appeals found that officer justifiably acted in self-defense), *cert. denied*, 112 S. Ct. 872 (1992); *Greenidge* v. *Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (officer's use of deadly force should be evaluated with respect to circumstances existing immediately prior to and at the moment force used; evidence of what occurred before not relevant); *Young* v. *City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985) (contention that officer created situation where fatal error was more likely possible basis for state negligence action, but not Fourth Amendment claim); *Sledd* v. *Lindsay*, 864 F. Supp. 819, 830 (N.D. Ill. 1994) ("there existed no clear standard of law that an officer must obtain confirmation that the threatening suspect knows that he is confronting a peace officer prior to using deadly force"); *James* v. *City of Chester*, 852 F. Supp. 1288, 1295 (D. S.C. 1994) (theory police unreasonably increased risk by earlier actions rejected; the Court would "focus only upon the reasonableness of the conduct at the moment [the officer] made the decision to use deadly force"); *Williams* v. *Richmond County, Ga.*, 804 F. Supp. 1561 (S.D. Ga. 1992) (even if errors in judgment were made in resolving situation, it could not be said that use of deadly force was unreasonable where woman advanced with weapon).

Only a few of the cases reviewed support the petitioner's premise, and those are distinguishable because the defendant officer intentionally provoked circumstances in which deadly

force would be required. *See, e.g., Estate of Starks* v. *Enyart*, 5 F.3d 230(7th Cir. 1993) (fact dispute existed on whether suspect attempted to run officer over, in which case, deadly force would be justified, or whether officer jumped in front of vehicle, thereby manufacturing incident); *Gilmere* v. *City of Atlanta*, 774 F.2d 1495 (11th Cir.1985) (officer's improper use of power in beating suspect created need to use deadly force when suspect retaliated), *cert. denied*, 476 U.S. 1115 (1986).

In contrast, in the vast majority of cases, an officer's self-defense shooting is reviewed for Fourth Amendment reasonableness at or near the moment of the shooting itself. A rationale for taking a longer look backward could exist where the defendant was a municipality or supervisor and past patterns or practices or decisions involving the planning or execution stages of an event were said to have created the risk that ultimately caused the constitutional harm. However, since only individual defendants in their individual capacities are respondents before this Court, those are issues that need not be considered on certiorari. For the foregoing reasons, this Court should decline petitioner's invitation to establish a rule about when Fourth Amendment scrutiny should begin in a self-defense police shooting case.

CONCLUSION

Wherefore, respondents City of Laconia, Town of Belmont, Detective David A.Gunter, Sergeant Brian Loanes, and Sergeant David Nielsen request that the petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,
CITY OF LACONIA, TOWN OF BELMONT,
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United States Court of Appeals
For the First Circuit

No. 95-1463

KATHY ST. HILAIRE, ETC.,

PLAINTIFF, APPELLANT,

v.

CITY OF LACONIA, ET AL.,

DEFENDANTS, APPELLEES.

ERRATA SHEET

The opinion of this Court issued on December 1, 1995, is amended as follows:

On page 22, the first paragraph should be deleted and the following paragraph inserted in its place:

Summary judgment in favor of the municipalities, the City of Laconia, the Town of Belmont and the County of Belknap, is affirmed because there is no evidence, even had the plaintiff shown a deprivation of St. Hilaire's constitutional rights, that it was as a result of official action taken pursuant to a "custom or usage" of the municipality. *See Monell* v. *New York City Dep't. of Social Servs.*, 436 U.S. 658, 691 (1978). Other than this single incident, there is no evidence even proffered to show such a municipal "custom and usage." Evidence of a single incident is usually unsufficient to establish a "custom or usage." *Mahan* v. *Plymouth County House of Corrections*, 64 F.3d 14, 16-17 (1st Cir. 1995).

No. 95-1653

Supreme Court, U.S.
FILED
MAY 24 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

KATHY ST. HILAIRE, Individually, and as Executrix for the Estate of Philip St. Hilaire,

Petitioner,

vs.

CITY OF LACONIA, Laconia, New Hampshire; TOWN OF BELMONT, Belmont, New Hampshire; COUNTY OF BELKNAP, Laconia, New Hampshire; DET. DAVID A. GUNTER, of the Laconia Police Department, in his individual and official capacity; SGT. BRIAN LOANES, of the Town of Belmont, in his individual and official capacity; SGT. DAVID NIELSEN, of the Town of Belmont, in his individual and official capacity; DEPUTY SHERIFF ROBERT DUPUIS, JR., of the Belknap County Sheriff's Department, in his individual and official capacity; DEPUTY SHERIFF DANIEL COLLIS, of the Belknap County Sheriff's Department, in his individual and official capacity,

Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS DEPUTY SHERIFF ROBERT DUPUIS, JR., DEPUTY SHERIFF DANIEL COLLIS AND COUNTY OF BELKNAP

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26pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Court of Appeals for the First Circuit properly analyzed the issue of qualified immunity when it held that, if at the time the police acted, they violated no clearly established constitutional right, the officers were entitled to qualified immunity.

A. Whether the lower courts properly decided that no "clearly established" right existed and then concluded its inquiry.

B. Whether the lower courts erred by narrowly construing what the "clearly established" right was.

II. Whether the First Circuit Court of Appeals correctly held that since the "knock and announce" requirement was not "clearly established" at the time of the alleged conduct, the issue of whether Respondents failed to identify themselves was immaterial as a matter of law.

A. The lower court did not err in holding that the factual dispute over whether adequate notice was given was immaterial as a matter of law.

III. Whether the Petition for Writ of Certiorari should be denied as to the Respondents Dupuis, Collis and the County of Belknap as they did not use excessive or deadly force.

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The opinion of the United States Court of Appeals for the First Circuit is cited as Kathy St. Hilaire, etc., Plaintiff-Appellant v. City of Laconia, et al., Defendants-Appellees, 71 F.3d 20 (1995).

The opinion of the United States District Court for the District of New Hampshire is cited as Kathy St. Hilaire, etc., Plaintiff v. City of Laconia, et al., Defendants, 885 F. Supp. 349 (1995).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution, Amendment IV:

> AMENDMENT IV — SEARCH AND SEIZURES
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

28 U.S.C.§ 1343(A)(3)(4):

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of a right, privilege or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT OF THE CASE

A. Factual Background

On April 27, 1990, Deputy Sheriff Robert Dupuis of the Belknap County Sheriff's Department presented a search warrant application and affidavit to the Laconia District Court for authorization to search the person of Philip St. Hilaire and the premises of an auto salvage business called Laconia Auto Wrecking. The application specified that the searches would seek the controlled drug cocaine, records or ledgers of drug sales, monies associated with the drug distribution business, firearms, drug distribution paraphernalia as well as other items associated with drug distribution.

The Affidavit in Support of the Search Warrant Application, signed and sworn to by Deputy Dupuis, described two controlled purchases of the controlled drug cocaine by a confidential informant who had previously purchased the drug from Philip St. Hilaire at the Laconia Auto Wrecking premises in April, 1990. A Justice of the Laconia District Court issued the search warrant

for Philip St. Hilaire and the premises of Laconia Auto Wrecking on April 27, 1990.

At or about 5:00 p.m. on August 27, 1990, members of the Belknap County Sheriff's Department, the Laconia Police Department and the Belmont Police Department convened at the Belknap County Sheriff's office to prepare for the joint execution of the search warrant. During this meeting a plan for the drug search was developed. A general discussion took place concerning the layout of the premises to be searched and the probability that Philip St. Hilaire would be armed and should be considered dangerous. The officers were aware that St. Hilaire carried a loaded gun on his person and had been known to keep a revolver under the counter at St. Hilaires' place of business at Laconia Auto Wrecking. Dupuis related a recent incident where an individual had stooped to pick up St. Hilaire's money bag when it dropped and Mr. St. Hilaire had stuck a gun to the individual's head. In addition, the officers discussed the exterior reflective glass at Laconia Auto Wrecking. During the meeting, the officers advised that the reflective glass on the front of Laconia Auto Wrecking made it very difficult for people to see inside but very easy for people inside to see outside.

As a result of the meeting, Sergeants Nielsen and Loanes of the Belmont Police Department, and Deputy Dupuis of the Belknap County Sheriff's Department were assigned to secure Philip St. Hilaire and to conduct the search of his person and the premises at Laconia Auto Wrecking. Detective Gunter was to be available with his drug dog, Lux, in order to detect drugs during the conduct of the search. Deputy Sheriff Daniel Collis was assigned to a position across the street from Laconia Auto Wrecking and was in radio communication with Deputy Dupuis while monitoring activity in front of Laconia Auto Wrecking on the evening of April 27, 1990. During earlier surveillance, Deputy Collis had monitored the unimpeded flow of persons in

and out the front door of the Laconia Auto Wrecking premises. However, shortly after his arrival at the scene, on April 27, 1990, Deputy Collis determined that the door to the building was locked because he observed a person approach the door and shake it before someone appeared to unlock the door to allow that individual entrance. Collis radioed this information to the search warrant team. Detective Gunter joined the team behind Laconia Auto Wrecking due to Dupuis' desire for additional support when it became known that the front door to Laconia Auto Wrecking was locked. As the team was discussing the information received regarding the locked door, Deputy Collis reported that Philip St. Hilaire was exiting the building, locking the front of his business and heading towards his vehicle in the parking lot.

Hoping to intercept St. Hilaire before he entered his vehicle, Deputy Dupuis gave the command "let's go." As St. Hilaire approached his vehicle, members of the team ran towards the parking lot from their positions around the side of the Laconia Auto Wrecking building. The officers approached St. Hilaire in the following order: Detective Gunter first, then Deputy Dupuis, then Sergeant Loanes and then Sergeant Nielsen. As the officers approached St. Hilaire; who by that time had seated himself on the front seat of his vehicle, the officers yelled "Phil!, Phil!, Police!" and "Freeze!, Police!" The officers yelled loud enough so that Deputy Collis could hear shouts of "Police" while he ran across Route 106 in the direction of St. Hilaire's vehicle. In addition, David B. McNeil, a passing motorist driving by Laconia Auto Wrecking with his windows rolled down, was able to hear "Freeze".

Detective Gunter approached the passenger side of the vehicle, having taken his badge from his belt and carrying it outstretched in front of him in his left hand. He was carrying his firearm in his right hand. At that time Gunter was wearing a

bright red t-shirt, jeans and a black bullet proof vest. Detective Gunter observed St. Hilaire turn as he shouted "Phil!, Phil!, Police!". St. Hilaire made eye contact with Gunter through the right rear window. Gunter observed St. Hilaire reach with his right hand to his right hip and put his hand on a .45 caliber automatic revolver. St. Hilaire then proceeded to draw the revolver out of his holster. At that moment Gunter fired a shot, without aiming, at St. Hilaire. At the time of the shooting, Gunter was holding his badge in his left hand.

After St. Hilaire was shot, Chief McCarty of the Belmont Police Department, who arrived shortly thereafter, removed Philip St. Hilaire's weapon from the front seat of the vehicle where it lay next to him. Sergeant Nielsen observed that St. Hilaire's right hand was on top of the gun which was on the seat at St. Hilaire's right. Sergeant Nielsen found an empty holster consistent with the weapon that was taken from Mr. St. Hilaire on St. Hilaire's right hip. He also found a aqua blue bag from which the state police later recovered three quarters of an ounce of cocaine with a street value of approximately $2,200 in St. Hilaire's jacket.

B. Procedural History

The Petitioner, Kathy St. Hilaire, is the Executrix for the Estate of Philip St. Hilaire, who filed suit in the United States District Court for the District of New Hampshire. In the complaint, the petitioner claimed that the defendants violated Philip St. Hilaire's Fourth Amendment rights by allegedly engaging in unreasonable conduct in conducting the search pursuant to the search warrant. The basis of her complaints against the respondent Deputy Sheriffs Robert Dupuis, Daniel Collis and the Belknap County Sheriff's Department were that they negligently created circumstances leading to the use of deadly force against Philip St. Hilaire. As neither Dupuis nor

Collis used any force against Philip St. Hilaire, the excessive force claims cannot pertain to the these respondents.

The Respondents moved for Summary Judgment at the District Court level on the basis that they were entitled to qualified immunity pursuant to this Court's ruling in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The District Court granted Summary Judgment in favor of the respondents pursuant to 42 U.S.C. § 1983; finding that the officers were entitled to qualified immunity as to all federal counts. The District Court held that the claims against Dupuis and Collis, which related to the negligent creation of circumstances leading to the use of deadly force, did not raise claims of a violation of rights which were "clearly established when the defendants acted" and accordingly the respondents were entitled to qualified immunity. The District Court properly applied the qualified immunity analysis set forth in *Sullivan v. Horta,* 4 F. 3d 2, 13 (1st Cir. 1993).

Petitioner subsequently appealed to the United States Court of Appeals for the First Circuit on somewhat different grounds. At the First Circuit, the petitioner focused her Fourth Amendment claim on the theory that the respondents *as a group* were required to provide adequate notice of their identity and purpose at the time that they approached Philip St. Hilaire. In that argument, the petitioner relied to a significant extent upon this Court's recent decision in *Wilson v. Arkansas,* 115 S. Ct. 1914 (1995). The petitioners were successful in responding that neither of Petitioner's theories against the defendants; the negligent creation of circumstances leading to the likelihood of serious injury or the so-called "knock and announce rule", were clearly established at the time that the conduct in question took place and therefore the respondents were entitled to qualified immunity.

The First Circuit, in sustaining the District Court,

summarized petitioner's theory as follows: if the police had properly *identified* themselves, St. Hilaire would have known they were the police and would not have made the movement in the direction of his gun which led to his shooting. The First Circuit concluded that this "right" to be notified of a police officer's identity and purpose was not "clearly established" at the time of the incident and therefore the respondents were entitled to qualified immunity. The Court specifically held that the right was not clearly established until, at the earliest, this Court's decision of *Wilson v. Arkansas, infra,* in 1995 and consequently was clearly not established in 1990, at the time that the conduct in this case took place.

Respondent's oppose the Petition for Writ of Certiorari on the basis that Summary Judgment was appropriate in this case and was properly granted and affirmed by the lower courts. Both the United States District Court and the First Circuit Court of Appeals properly applied the qualified immunity analysis and held, *as a matter of law* that the respondents were entitled to qualified immunity.

REASONS FOR DENYING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT PROPERLY ANALYZED THE ISSUE OF QUALIFIED IMMUNITY AND HELD THAT, IF AT THE TIME THE POLICE ACTED, THEY VIOLATED NO CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT, THE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY.

Petitioner asserts that one of the reasons for granting the Writ of Certiorari in this case arises from the District Court and First Circuit's refusal to determine a factual issue, *i.e.*, whether the officer's conduct was reasonable under the Fourth Amendment. Petitioner has relied entirely upon cases wherein the court was called upon to evaluate the *facts* for a substantive reasonableness inquiry under the Fourth Amendment. None of these cases involved the legal issue of qualified immunity. *See Tennessee v. Garner*, 470 U.S. 1 (1985) and *Graham v. Connors*, 490 U.S. 386 (1989). Petitioner's efforts to create a requirement for a reasonableness analysis in all cases involving a Fourth Amendment challenge flies in the face of this Court's earlier pronouncements on the issue of qualified immunity and provides no valid basis for the granting of certiorari in this matter.

Law enforcement officers are entitled to qualified immunity from suit in civil actions under 42 U.S.C. § 1983 as long as their conduct "did not violate clearly established statutory or constitutional rights of which a reasonable [police officer] would have known." *Harlow*, 457 U.S. at 818. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The doctrine of qualified immunity protects officials

unless "the law clearly proscribed the actions" they took. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985).

A. The lower courts properly decided that no "clearly established" right existed and concluded its inquiry.

The appellate assessment of qualified immunity is divided into two analytic components. First, if the right asserted by the plaintiff was "clearly established" at the time of its alleged violation, the court is required to assume that the right was recognized by the defendant official. *Harlow*, 475 U.S. at 818. Second, the court will deny immunity if a reasonable official situated in the same circumstances should have understood that the challenged conduct violated that established right. *Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987). The qualified immunity defense was created, in part, so that officials might reasonably anticipate when their conduct may give rise to liability for damages. *Davis v. Scherer*, 468 U.S. 183, 191 (1984).

The first prong of the proper analysis to determine whether an individual is entitled to qualified immunity requires a court to determine, as a matter of law, whether the right the official is alleged to have violated has been "clearly established." *Anderson*, 483 U.S. at 640. *See also, Mitchell*, 472 U.S. at 525-526 (recognizing a party's entitlement not to stand trial or face other burdens of litigation pending the resolution of the essentially legal question as to whether the conduct of which the plaintiff complains violated clearly established law).

If the trial court finds that the constitutional right allegedly violated was not clearly established at the time of the conduct, the official is then entitled to qualified immunity. *Siegert v. Gilly*, 500 U.S. 226, 234-235 (1991). Contrary to the arguments raised by petitioner, the District Court is not authorized to go on to an inquiry into the reasonableness of the officer's actions if it

has concluded that the "right" was not clearly established at the time of the alleged violation. A reasonable official is entitled to qualified immunity if the "right" was not so established so that he or she could anticipate that his or her conduct would give rise to liability for damages. *Davis,* 468 U.S. at 195.

In *Siegert,* this Court held that, because plaintiff's claim failed to allege a violation of any constitutional rights, it should be dismissed. *Siegert,* 500 U.S. at 227. In *Siegert,* the plaintiff sought damages against the defendant for allegedly publishing a defamatory statement maliciously, in bad faith and in violation of the due process clause of the Fifth Amendment. The District Court had found that the factual allegations were sufficient to state violations of a clearly established constitutional right and allowed discovery to proceed on a limited basis. The defendant appealed and the Circuit Court reversed and remanded with instructions that the case be dismissed. After noting that the purpose of the qualified immunity defense is to spare a defendant from unwarranted liability and the demands of a lengthy and expensive lawsuit, the Court stated that "this case demonstrates the desirability of this approach to a claim of immunity, for Siegert failed not only to allege the violation of a constitutional right that was clearly established at the time of Gilly's actions, but also to establish the violation of any constitutional right at all." *Siegert,* 500 U.S. at 227.

The District Court and the First Circuit Court of Appeals in the instant case appear to have followed the direct guidance derived from this Court's decision in *Siegert.* Both courts evaluated the petitioner's claims and concluded that a "clearly established" constitutional right to have officers identify themselves and their purpose did not exist in 1990. Once the District and Circuit Court found that no "clearly established" right existed it properly concluded its analysis and dismissed the petitioner's claims on the basis of qualified immunity. *See*

Mitchell, 472 U.S. at 526; *Horta*, 4 F.3d at 13 (1st Cir. 1993); *Harper v. Harris County, Texas*, 21 F.3d 597 (5th Cir. 1995); *Jones by Jones v. Webb*, 45 F.3d 178 (7th Cir. 1995); *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995); *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991).

B. The lower courts did not err by narrowly construing what the "clearly established" right was.

Petitioner alleges that the lower courts erred by finding that the clearly established right was not the broad right to be free from unreasonable search and seizures but rather the narrower right to have police officers identify themselves and their purpose when enforcing a search warrant. Petitioner's view of the court's function in identifying the clearly established right is erroneous and inconsistent with well-settled precedent.

The precedent for the Court's evaluation was first set in *Anderson v. Creighton, supra*, where the plaintiff alleged that the "clearly established" right involved in his case was the right to be protected from warrantless searches of his home unless the officers had probable cause and there were exigent circumstances. *Anderson*, 483 U.S. at 638. This Court, in analyzing the plaintiff's view that the "right" must be interpreted broadly, noted that:

> the operation of the standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates the Clause (no matter how unclear it may be that the particular action is a violation) violates a

> clearly established right. Much the same could be said of any other Constitutional or statutory violation.

Anderson, 483 U.S. at 639.

The Court then went on to state that "the right the official is alleged to have violated must have been 'clearly established' in a more particularized and hence more relevant sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. The Court has consistently upheld the requirement that a plaintiff's constitutional claims, for purposes of the qualified immunity analysis, must be specific to the facts of the particular case. For example, in *Elder v. Holloway*, 127 L. Ed. 2d 344 (1994), the plaintiff had alleged that his warrantless arrest violated his "clearly established" right to be free from unreasonable seizures under the Fourth Amendment. *Elder*, 127 L. Ed. 2d at 348. The District Court evaluated the plaintiff's claims under a case specific analysis, *i.e.* whether the warrant requirement applied when the officers surrounded his house and requested that he come out of the house and surrender. *Id.* at 349. The District Court found that "for that scenario, the one presented here" no controlling case law existed. *Id.*

Similarly, in *Mitchell*, 472 U.S. at 515, the respondent, Forsyth, had alleged that the use of warrantless wiretaps violated his Fourth Amendment rights. The Court, in evaluating whether Mitchell was entitled to qualified immunity, determined that the plaintiff was alleging a more specific claim; the right to be free from an Attorney General's use of warrantless electronic surveillance to gather intelligence for national security purposes. *Mitchell*, 472 U.S. at 533-535. The Court held that, although Congress had passed legislation limiting the use of

warrantless wiretaps by state and federal law enforcement agencies, no restrictions had been put on the power of the President or other Executive authority to engage in the same conduct and therefore there was no "clearly established" right to be free from such conduct at the time of the wiretapping. *Id.* at 535.

A proper qualified immunity analysis therefore, requires the lower court to evaluate the specific facts of the case to determine the "clearly established" constitutional right. In the instant case, the Circuit Court properly narrowed the focus from a generic Fourth Amendment unreasonable search and seizure claim to the claim actually alleged by the petitioner here, *i.e.*, the appropriateness of the failure of plain clothes police officers to announce their identity and purpose, while approaching the petitioner in his vehicle pursuant to a valid warrant. Under both *Mitchell* and *Elder,* the First Circuit's decision to properly restrict the scope of its review of petitioner's claims is neither error nor does it establish a basis for granting a Writ of Certiorari in this case.

II.

THE FIRST CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT SINCE THE "KNOCK AND ANNOUNCE" REQUIREMENT WAS NOT "CLEARLY ESTABLISHED" AT THE TIME OF THE ALLEGED CONDUCT, THE ISSUE OF WHETHER RESPONDENTS FAILED TO IDENTIFY THEMSELVES WAS IMMATERIAL AS A MATTER OF LAW.

The Fourth Amendment to the Constitution protects "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, [which] shall not be violated and no warrant shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person or persons to be seized." U.S. Const. amend. IV.

Petitioner alleges that the Fourth Amendment prohibition against "unreasonable searches" would have required the respondents in this case to identify themselves as police officers and state their purpose prior to apprehending St. Hilaire in his car. Petitioner's argument below was based upon this Court's decision in *Wilson v. Arkansas,* 115 S. Ct. 1914 in which this Court held that the reasonableness of the search of a *dwelling* depended, in part, on whether law enforcement officers announced their presence and authority prior to entering; thus incorporating the common law "knock and announce" rule into the Fourth Amendment (emphasis added). Petitioner's reliance upon *Wilson v. Arkansas* is misguided in a number of ways. First, the decision in *Wilson* focused upon the importance of privacy interest in one's dwelling place. The *Wilson* opinion traced the common law protection of a man's home as his "castle of defence and asylum" back to Blackstone's Commentary and such old English common law precedents as *Semayne's Case,* 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1603). *Wilson,* 115 S. Ct. at 1916. This Court has recognized that one's right to privacy in one's home is a "precious" right. *Miller v. The United States,* 357 U.S. 301, 307 (1958).

The First Circuit, however, properly recognized the distinction between the privacy interest in a person's home and a person's car. Moreover this Court held in *Cardwell v. Lewis,* 417 U.S. 583 (1974) that "one has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants and its contents are in plain view." *Cardwell,* 417 U.S. at 590. More recently, this

Court held, in *California v. Carney*, 471 U.S. 386 (1985), that the "reduced expectations of privacy derived not from the fact that the area to be searched is in plain view but from the pervasive regulation of vehicles capable of traveling on the public highways." *Carney*, 471 U.S. at 391.

Thus, it would seem that petitioner bears the burden of establishing that the holding handed down by this Court in *Wilson;* relating to the so called "knock and announce" rule, has any relevance to the conduct of police officers in seizing an individual sitting in his vehicle for whom they have a valid warrant. *See Elder,* 127 L. Ed. 2d at 350. In an attempt to meet that burden, St. Hilaire bases her argument on a number of cases and statutes which purportedly stand for the proposition that the "knock and announce" rule was a clearly established right. *See* Petitioner's references to 18 U.S.C. § 3109 (limiting the breaking of doors or windows of a *house* to execute a search warrant); *Miller v. United States,* 357 U.S. 301 (1958) (forced entry into a *home*); *Sabbath v. United States,* 391 U.S. 585 (1968) (forced entry into an *apartment*); *Ker v. California,* 374 U.S. 23 (1963) (intrusion onto the privacy rights of the occupants of a *dwelling*); *Weeks v. United States,* 232 U.S. 383, 393 (1914) (seizure of personal paper from a person's *home* in his absence) (emphasis added). None of these cases, however, applied the "knock and announce" rule to circumstances which did not involve a person's home or dwelling. As a result, St. Hilaire has failed to provide any authority from which the lower courts could find that the "knock and announce" rule for searches and seizures applies beyond a person's home or dwelling. As petitioner's claim fails to state a violation of clearly established law, the respondents are entitled to qualified immunity. *Mitchell v. Forsyth,* 472 U.S. at 526.

The Petitioner is also misguided in her attempts to rely on this Court's opinion in *Wilson* because, to the extent that the

knock and announce rule creates a "clearly established" right under the present case, this right was not established until 1995, the date of this Court's opinion in that case. The Court has rejected the retroactive application of cases creating a "clearly established" right to earlier conduct. *Mitchell,* 472 U.S. at 535.

In *Mitchell,* the plaintiff had alleged a violation of the Fourth Amendment as a consequence of the defendant's use of a warrantless wiretap for purposes of national security. The wiretapping occurred from November, 1970 through January, 1971. At the time the wiretapping occurred, a conflict existed among federal district and circuit courts as to whether the Attorney General could legally authorize warrantless wiretaps. *Mitchell,* 472 U.S. at 533. One year after the wiretapping, this Court ruled, in *United States v. United States District Court,* 407 U.S. 297 (1972) (Keith), that the Fourth Amendment does not permit the use of warrantless wiretaps in cases involving domestic threats to national security. The petitioner, former Attorney General John Mitchell, maintained that he was entitled to qualified immunity because, at the time of the alleged conduct, it was not clearly established that his use of warrantless wiretaps for purposes of national security would violate a person's constitutional rights. *Mitchell,* 472 U.S. at 515. This Court ultimately held that "the legality of the warrantless domestic security wiretap Mitchell authorized in November, 1970, was, *at that time, an open question.*" *Id.* at 535. (emphasis added). This Court therefore upheld the proposition that decisions "clearly establishing" the relevant constitutional right should not be retroactively applied to public officials under a qualified immunity analysis. *Id.* at 535. In the instant case the First Circuit Court of Appeals therefore properly held that the "knock and announce" rule was not a clearly established constitutional right until the *Wilson* decision in 1995 and so could not be retroactively applied to the respondent's conduct.

The petitioner has also claimed that violations of state constitutional law and regulations should be considered a violation of a "clearly established" right pursuant to the qualified immunity analysis. However, this Court has previously held that a respondent's violation of state law or administrative regulations do not create a clearly established right so as to overcome the defendant's entitlement to qualified immunity. *Elder,* 127 L. Ed. 2d at 350. Similarly, in *Davis,* 468 U.S. at 193 the plaintiff alleged that the defendant's violation of Florida's statutory provisions governing removal of state employees' which had the force of state law, was prima facie evidence that the defendant's conduct was unreasonable. The plaintiffs in *Davis* alleged that "official conduct that contravenes the statute or regulation is not 'objectively reasonable' because officials fairly may be expected to conform their conduct to such legal norms." *Davis,* 468 U.S. at 193. In rejecting this argument, this Court held that "an official would not be held liable in damages under § 1983 unless the constitutional right he was alleged to have violated was "clearly established" at the time of the violation. . . . [O]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis,* 468 U.S. at 193. St. Hilaire's reliance upon such state and regulatory authorities as the Model Penal Code, the New Hampshire Supreme Court decision in *State v. Jones,* 127 N.H. 515 (1985) and New Hampshire R.S.A., 627:5, 11(b)(2) is misplaced and improper under this Court's opinions in both *Elder* and *Davis.* The lower court properly rejected St. Hilaire's claims based on those authorities and petitioner has failed to demonstrate that this issue should be reviewed anew by this Court in the face of its previous consistent pronouncements.

A. The lower courts did not err in holding that the factual dispute over whether adequate notice was given was immaterial as a matter of law.

The First Circuit found that there was a dispute of fact as to whether the police did identify themselves when they approached St. Hilaire. Although St. Hilaire asked shortly after the incident, "why didn't the police identify themselves", the respondents also produced significant evidence that identification and warnings were given to St. Hilaire during their approach. With respect to issues other than the respondent's entitlement to qualified immunity, the factual dispute noted above might have precluded the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). However, pursuant to the analysis established by this Court, the lower court was justified in summarily disposing of this case as it properly found that the right alleged to have been violated was not "clearly established" at the time of its alleged violation. The petitioner failed to demonstrate the existence of a "clearly established" right and respondents were therefore, entitled to qualified immunity as a matter of law. The lower courts were not obligated to attempt to address any alleged factual disputes as petitioner did not meet the threshold burden of proof of showing the existence of a "clearly established" right. Lower courts, consistent with precedent, need not evaluate factual disputes when, as a matter of law, the defendant is entitled to qualified immunity. *Elder v. Holloway*, 127 L. Ed. 2d 344, 350-51 (1994).

III.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS TO THE RESPONDENTS DUPUIS, COLLIS AND THE COUNTY OF BELKNAP AS THESE RESPONDENTS DID NOT USE EXCESSIVE OR DEADLY FORCE AGAINST THE PETITIONER.

The final argument which the petitioner presents as a basis for granting Writ of Certiorari is the issue of the application of qualified immunity to excessive force cases. Petitioner argues that the circuit courts have rendered confusing and conflicting opinions concerning whether qualified immunity can be used as a defense in excessive force cases.

The only excessive force allegations raised in this case have been directed against Detective David A. Gunter of the Laconia Police Department as a result of his use of his weapon. Petitioner did not allege below and does not allege here, that Dupuis, Collis or the County of Belknap used any force against Philip St. Hilaire. At the time St. Hilaire was shot, Deputy Sheriff Collis was approaching the scene from across the street. Deputy Sheriff Dupuis was approaching St. Hilaire behind Gunter and never discharged his weapon or used any other form of force against Mr. St. Hilaire. Therefore, respondents Dupuis, Collis and the County of Belknap request that if this Court is inclined to grant the Petition based solely upon the issue of whether qualified immunity can be raised as a defense to a claim of the use of excessive force, that the Petition be denied as to these respondents.

CONCLUSION

Wherefore, the respondent requests that this Court grant the following relief:

A. Deny the Petition for Writ of Certiorari;

B. Deny the Petition for Writ of Certiorari as to Respondents Dupuis, Collis and Belknap County;

C. Affirm the Judgment of the First Circuit Court of Appeals; and

D. Grant such other and further relief as this Court deems fair and just.

Dated: May 24, 1996

Respectfully submitted,

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